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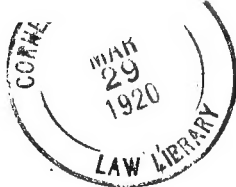
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## PREFACE TO NEW EDITION

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THIS edition contains 100 decisions not included in the previous edition, 36 of which are new for the first time published. To the very accurate Reports of *The Irish Law Times* I am indebted for the remaining 64 cases. No decision containing any matter of principle, and not over-ruled in a higher court, reported in that admirable publication, has been omitted in this work.

Of the 190 cases reported in the present volume, 76 are not reported elsewhere. 77 cases deal with questions arising on claims under the Ulster Tenant-right Custom. The remaining 113 are conversant with the other sections of the Land Act.

The Land Appeals are entitled as in the Court below—*i.e.*, as claimant *v.* respondent.

R. DONNELL.

76, STEPHEN'S-GREEN, SOUTH, DUBLIN,  
*June, 1876.*



# EXTRACTS

## FROM THE

### PREFACE TO THE FIRST EDITION.

---

“THE origin of this Treatise was the discussion which arose during the past year on the leaseholders’ right to the benefits of the Ulster Custom. The contention against their rights appeared to me so unwarranted by the prevalent usage of the province, as it fell under my own observation, and as disclosed in the evidence of landlords and agents before the Devon Commission and in other Parliamentary inquiries—so contradictory of the history of Tenant-right, and even of the divisions on and amendments of the Land Act itself—and based, moreover, on such narrow points of law, that I felt it right to put before the profession and the public, in an accessible form, the result of somewhat laborious investigations into the history and nature of Tenant-right and Irish leases on which I had been for a long time engaged. I thought it desirable to add some chapters on other ill-understood Tenant-right questions. Reports of all the Tenant-right cases of any importance have been added—together with reports of decisions on the general provisions of the Act, derived from *The Irish Law Times*, or from my own acquaintance with the cases. Most of the judgments in the Land Sessions Courts have been revised by the Chairmen who delivered them; and to those gentlemen I beg to tender my hearty thanks.

“Copies of the proof-sheets of these Chapters on Tenant-right were extensively circulated in last June and July, when

the motion of Lord Lifford for the appointment of a Select Committee on the Irish Land Act, and the investigations of that Committee, brought the question of the Ulster Leaseholders' Tenant-right into unusual prominence. I mention this circumstance, not merely because to this limited publication is in some measure due the more favourable acceptance the leaseholders' claim has since received in legal circles—as some of the decisions in this volume testify—but principally because the materials I had collected were freely, but with my concurrence, drawn upon in his evidence by one of the witnesses before that Committee, the Rev. Professor Rogers. The postponement of the full publication till the present time makes it necessary for me to make this statement, as it might seem that these Chapters, apparently of later date, were suggested by his evidence.”

R. D.

*June, 1873.*

# John Givan

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## CORRECTIONS.

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### PAGE

- 17, line 1 from bottom, for "tenant-right not in town-parks, these the Act covers, leaving them to be governed by the facts of the custom—but," *read* "tenant-right in town parks and town-houses."
- 120, line 6, for "not even," *read* "except, as has at length been decided."
- 392, line 18, after "within the," *add* "third section of the."
- 413, line 13, for "accident," *read* "incident."
- 413, line 11 from bottom, for "creditor," *read* "debtor."

*J. L. M.*  
*11/24/31*

# THE IRISH LAND COURTS.

## COURT FOR LAND CASES RESERVED.

The LORD CHANCELLOR, the MASTER OF THE ROLLS, the LORD JUSTICE OF APPEAL, the VICE-CHANCELLOR, the CHIEF JUSTICE OF THE QUEEN'S BENCH, the CHIEF JUSTICE OF THE COMMON PLEAS, the CHIEF BARON OF THE EXCHEQUER, and the other JUDGES of the SUPERIOR COURTS OF COMMON LAW.

## JUDGES OF LAND APPEALS.

The JUDGES of ASSIZE, and, in the County or County of the City of Dublin, two JUDGES of the SUPERIOR COURTS OF COMMON LAW, selected from time to time by the COURT FOR LAND CASES RESERVED.

## LAND COURTS OF FIRST INSTANCE.

The JUDGES OF THE CIVIL BILL COURTS.

## LIST OF CHAIRMEN

*(Verified by reference to the Records of the Hanaper Office).*

NAMES	Date of Original Appointment	COUNTY	
		Original	Present
D. R. Kane, Q.C.,	1836, Dec. 15,	Leitrim, -	Cork, E.R.
W. N. Barron,	1841, Aug. 26,	King's County, -	Monaghan
C. J. Trench, Hon.,	1847, Nov. 27,	Westmeath, -	Dublin
James Gibson, Q.C.,	1850, Oct. 3,	Queen's County,	Donegal
R. Johnston, Q.C.,	1857, April 28,	Longford,	Down
J. H. Otway, Q.C.,	1858, Oct. 1,	Antrim, -	Antrim
E. Molyneux, Q.C.,	" Oct. 8,	Meath, -	Meath
T. Lefroy, Q.C.,	" Dec. 27,	Kildare, -	Armagh
James Robinson, Q.C.,	1859, June 11,	Roscommon,	Cavan
T. R. Henn, Q.C.,	" June 13,	Carlow, -	Galway
P. J. Blake, Q.C.,	" Aug. 5,	King's County, -	Fermanagh
J. H. Richards,	" Oct. 3,	Waterford,	Mayo
H. West, Q.C.,	1860, Feb. 28,	King's County, -	Wexford
J. C. Coffey, Q.C.,	" March 7,	Westmeath, -	Derry
T. De Moleyns, Q.C.,	" Oct. 15,	Cork, E.R., -	Kilkenny
C. Rolleston Spinner, Q.C.,	1861, March 23,	Mayo, -	Tipperary
Sir F. W. Brady, Bart.,	" Dec. 28,	King's County, -	Tyrone
J. Clarke, Q.C.,	1862, Nov. 21,	Cavan, -	Queen's Co.
C. H. Hemphill, Q.C.,	1864, April 4,	Louth, -	Kerry
J. O'Hagan, Q.C.,	" April 4,	Westmeath, -	Clare
C. Kelly, Q.C.,	1865, March 30,	Longford, -	Longford
H. P. Jellet, Q.C.,	" April 3,	King's County, -	King's Co.
J. C. Neligan, Q.C.,	1866, March 31,	Louth, -	Leitrim
J. P. Hamilton, Q.C.,	1868, May 30,	Carlow, -	Sligo
W. F. Darley, Q.C.,	" Dec. 4,	Wicklow, -	Wicklow
James Wall, Q.C.,	" Dec. 5,	Carlow, -	Carlow
A. Hamill, Q.C.,	1869, July 8,	Cork, W.R., -	Roscommon
R. Ferguson, Q.C.,	1872, March 7,	Cork, W.R., -	Cork, W.R.
G. Waters, Q.C.,	" May 27,	Waterford, -	Waterford
W. O'C. Morris,	" June 15,	Louth, -	Louth
T. A. Purcell, Q.C.,	1874, Nov. 12,	Limerick, -	Limerick
R. Carson, Q.C.,	1875, May 14,	Kildare, -	Kildare
J. F. Elrington, Q.C.,	1876, Feb. 10,	Westmeath, -	Westmeath





# BOOK I.—HISTORICAL

## PART I.—*POLITICAL LEASES.*

---

### CHAPTER I.

#### INTRODUCTORY.

DOES the Ulster tenant-right custom extend to leased lands as well as lands held under tenancies from year to year? Such is a question which has lately been asked inquiringly by some, with astonishment and surprise by others. The question, involving, as it does, the rights of the occupiers of 32,000 holdings in Ulster alone, and the title to five and a-half millions worth of property to which the Irish Land Act has given legal recognition, is well worthy of an answer,—an answer which, to be satisfactory, must not be dictated by petulance or prejudice, but should be based on a calm, impartial, and patient investigation of the subject. Such is the answer which in these pages I hope to be able to return.

It is a mixed question of fact and law. The Land Act has legalized “what is known as the Ulster Custom.” It has done this without definition and with but one restriction, that the Act shall not apply to holdings other than such as are agricultural or pastoral. It leaves without legal sanction the town tenant-right, by which I mean the tenant-right ~~not~~ in town-parks—these—

~~the Act covers, leaving them to be governed by the facts of the custom but the tenant right in~~ <sup>and</sup> town houses, which, as a matter of long-established practice and with the consent of the landlords, has prevailed in many villages and some towns of Ulster. Save in this one respect, the Act has in no way lessened or restricted the custom. Primarily, then, we must know whether, as a matter of fact, before the passing of the Act, the Ulster tenant-right custom extended to leased lands; and if this is so, we must next inquire whether there is any principle of law which the legislature has overlooked, to prevent the fulfilment of its manifest and declared intention in giving the sanction of law to the facts of the custom, the whole custom, and nothing but the custom. If there is such a principle, the statute has failed; the intention of Parliament has been frustrated; and, so far as the leased lands are concerned, the facts of the custom and the law of the land still continue irreconcilable.

The inquiry into the facts must take precedence. We need not go back to the time of the Ulster Plantation, nor indeed to any remote period in this inquiry; nor if we did, should we possibly find much to reward our pains. Whilst the tenant-right dealings of the tenants of Ulster were uninterfered with by their landlords—ere yet economists, full of one idea of free trade, had suggested that dealings between landlord and tenant were within their sacred principle of non-interference with the great law of supply and demand, which confessedly ruled the dealings between tenant and tenant, and between customer and dealer—ere yet the pressure of population on subsistence, or the burden of a Poor Law had stimulated selfishness to repeat the

language of spurious science as its justification—in that earlier time while the custom was inviolate, its name was unmentioned. Thomas Carlyle has discoursed of the glory of unconsciousness. Happy, says the sage, was the man who never knew he had a stomach. To be envied were the Ulster tenants when dispossession being unknown, and improvements unconfiscated, while enjoying in reality the protection of the usage of the province, they were unconscious that they possessed what jurists call tenant-right. The right was not spoken of till the wrong had been wrought.

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## CHAPTER II.

### THE IRISH PENAL AND ELECTORAL LAWS.

A FEW historical facts must be first mentioned, which shed light on our inquiry. I beg the reader to keep them in mind. The connexion between political and social arrangements is most intimate. The laws modify circumstance; they alter character. Planted in the field of religion or politics, they ramify to the furthest verge of social arrangement. The English and Irish Law and Chancery Commissioners trace to the penal laws the peculiar law of judgments in Ireland. To the same source may be traced many of the peculiarities of the Irish land system.

Barely a century has passed since the law first permitted an Irish Catholic to take a lease. In 1771, an Irish statute, 11 & 12 Geo. III., c. 21, allowed Roman Catholics to take a lease for 61 years, of not less than 10 acres or more than 50 of bog, not less than 4 feet

deep, with only half-an-acre of arable land for the site of a house, but not to be situated within a mile of the town; and if it was not reclaimed in 21 years the lease to be void.

The next step in advance was taken in 1777, when the Irish statute 17 & 18 Geo. III., c. 49, enabled Roman Catholics, from and after 1st August, 1778, to take leases not exceeding 999 years certain, or determinable on a life or lives, not exceeding 5, the rent to be reserved *bonâ fide* in money.

In 1782 they were allowed to acquire freehold property for lives or by inheritance.

In 1793, the Irish Act, 33 Geo. III., c. 21, was passed, which first gave the franchise to Roman Catholics. The franchise was then the 40s. freehold; and such it continued till 1829.

In that year, the Act of 10 Geo. IV., c. 8, was passed, which swept away the 40s. freehold franchise, substituting for it the £10 freehold.

In 1832, a further change was wrought. The Act 2 & 3 Wm. IV., c. 88, extended the franchise to leases for 14 years of lands of £20 annual value, and to leases for 20 years of £10 value.

In 1850 a lease ceased to be the exclusive qualification for a tenant's vote. The Act 13 & 14 Vic., c. 69, gave the franchise to yearly tenants rated for the poor-rate at a net annual value of £12.

## CHAPTER III.

## THE MIDDLEMAN SYSTEM.

THE effect of these several statutes on the relations between landlord and tenant in Ireland I have now to state. The exclusion of Roman Catholics from the benefit of holding by lease up to 1778, had the obvious effect of leaving the great mass of the people in the south and west tenants-at-will.

In England, Adam Smith remarked that the possession by "a great part of the yeomanry" of the 40s. freehold franchise, made them "respectable to their landlords, on account of the political consideration which this gave them" (*Wealth of Nations*, Bk. iii., c. 2). In Ireland, the exclusion of the Roman Catholics from the franchise up to 1793 left them without the respect which always accompanies political consideration. The landlord was under no inducement to cultivate friendly or neighbourly relations with the occupier of the soil. Absenteeism was encouraged, and the middleman system became a social necessity (see the evidence of Sir Thomas Wyse before the Select Committee on the State of the Poor in Ireland, 1830). The landlord could not in the south and west lease his land in small tracts, for there were few Protestants, and of those few only a small proportion were able to become lessees of large tracts.

It was otherwise in the north. There a large proportion of the occupiers of the land were Protestants, united by ties of race, religion, and common interest, with the lords of the soil; and the Ulster Plantation,

in this differing from all previous settlements, included even the Celtic Irish as recognized settlers. We need not then be surprised to find in this province the wide, if not universal prevalence, even among the law-banned Catholics, of customs favourable to the tenantry, and affording them substantial interests in the soil.

The middleman system—properly so called—hardly existed in the Protestant districts of the north. This is evident from the statistical surveys of the several northern counties undertaken in the first years of the present century, under the direction of the Dublin Society. It is attested by numberless witnesses examined before the Devon Commission. “The system of middlemen is quite unknown,” says J. V. Stewart, Esq., county Donegal (Evidence before Land Occup. Commission, Vol. i., p. 746). “The extensive-holding middleman, common in other parts of Ireland, is hardly known in this,” says Lieut.-Col. W. Blacker, co. Armagh (*ibid.*, p. 458). “We have no middlemen,” says Captain James Robinson, land agent to extensive estates in Armagh and Down (*ibid.*, p. 419). “The middleman system does not at all prevail in that part of the north of Ireland with which I am acquainted,” says W. Sharman Crawford, Esq., M.P. (*ibid.*, p. 198). “There are very few holdings under middlemen,” says Edward Golding, Esq., J.P., agent to Lord Blayney, county Monaghan (*ibid.*, 888). “There are very few middlemen,” says James Anderson, Esq., agent to large estates in Tyrone (*ibid.*, p. 807).

These gentlemen speak of the lowlands of Ulster. But in the mountainous districts of the north, peopled almost exclusively by a Celtic population, for the same

reason as in the south, middlemen leases were not uncommonly granted in the last century.

My conclusion is this:—

*The prevalence of the middleman system in the south, and its comparative absence in the north, are to be traced to the Penal Laws.*

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## CHAPTER IV.

### STATISTICS OF LEASES AND SUBDIVISION.

BUT if middlemen were all but unknown in the north of Ireland, leases to the occupying tenants were very common. About the year 1800 leases were more common than yearly tenancies now are. Why they were then, and for a generation afterwards, in favour with landlords, and why they since fell into disfavour, I shall show hereafter. At present I am concerned with the fact merely of their extensive prevalence. The Rev. John Dubourdieu, author of the *Statist. Survey of Co. Down*, Dubl. 1802, tells us that the number of freeholders who voted in the election of 1790 in that county amounted to 6,000, and that since that period they had considerably increased (p. 46). The same gentleman tells us, in his *Survey of Co. Antrim*, 1812, that on the Marquis of Hertford's estate, comprising about 44,500 acres, there were 3,600 tenants who had leases from his lordship, "which gives to each tenant about  $12\frac{1}{2}$  Irish acres" (Vol. ii., p. 448). Hugh Wallace, Esq., solicitor and land-agent, of Downpatrick, co. Down, stated, in his evidence before the Select Committee on the State of Ireland, 1825, that about 10,000 freeholders might be polled in the co. Down (1st Report,

p. 145). In the same county in 1828, it appears from a parliamentary return presented in the year 1830 (Vol. xxix., p. 475), that there were 713 £50 freeholders, 176 £20 freeholders, and 10,775 40s. freeholders on the registry. The increase from 1790 to 1828 in the county Down was not more than in proportion to the increase of population and cultivation, when we consider that in the latter year it included the Catholics who after 1793 got political leases. The truth is, that at both periods practically all the land in the county in the possession of tenants who could register was under lease.

But in 1829 a change occurred in the social economy of Ulster. Leases of small holdings were no longer granted by the landlords. The motive for granting them was gone. It was political. The 40s. freehold franchise had in that year been abolished.

Nor was the political lease confined to Ulster. In the south and west, ever since 1793, the creation of freehold leases had gone on apace. The Catholic tenant voted with his Protestant landlord for a Protestant representative. He had no choice. A Catholic could not before 1829 enter the House of Commons. Hence up to the latter date, or rather up to a date a little earlier, 1828, when O'Connell was elected for Clare, there was no diversity of political interests; and the Catholic tenants got leases which entitled them to register as voters, and swell the influence of their landlords. On 1st January, 1828, there were registered in Clare 8,557 voters, 7,723 of whom were 40s. freeholders; Limerick had 9,277; Mayo, 24,417; and Galway, 33,014.

As in the north, so in the south and west, the great mass of these voters were valued under £10. Whilst



in Down, in 1828, the registered electors, under the 40s. freehold franchise, numbered 11,664; under the £10 freehold franchise in the following year there were only 1,990. In Clare the numbers sank on 1st June, 1829, to 1,604; in Limerick, to 3,142; in Mayo, to 1,055; and in Galway, to 2,052.

The motive which had led to the creation of the 40s. freeholders now prompted their destruction. From 1829, a £10 lease for a life or lives, and from 1832 a £10 lease for years was the lowest interest which gave the right of voting. Henceforth we find consolidation of farms coming into fashion, but the system of leasing still continuing in Ulster, where the tenant could register. The political motive fell in with and received an impetus from a pecuniary motive, which had a few years' earlier origin in the inability of the small tenants to pay the war-rents; a circumstance which is noticed at length hereafter.

The extinction of leases for lives was more rapid in the other three provinces than in Ulster. The Clare election in 1828 showed that the Catholic voters could not be reckoned for the landlord. Had the 40s. freehold not been abolished in 1829, the system of leasing would have received almost as great a check. The consolidation system stopped at the £10 freeholder in the north; it had no limit in the south. The southern tenant, unless his vote were deemed perfectly safe, had, as a general rule, no choice but to remain a yearly tenant.

From this statement it appears:—

1. *In the end of the last and the first quarter of the present century particularly, all the land in the possession of tenants who could register was under lease.*

2. *After that period leases were infrequent in the south in the case of all holdings, they continued frequent in the north in the case of holdings above £10 value.*

3. *The difference was due to political considerations.*

## CHAPTER V.

### POLITICAL LEASES.

#### SEC. I.—*The Early Evidence.*

THIS is my proposition,—the ordinary lease in Ulster was political. It was granted as a qualification for the franchise, at the desire of the landlord more than that of the tenant. Its form changed as that qualification was altered. It fell into general disuse when it ceased to serve the landlord politically. Leasing was not a commercial transaction, but a political form.

I now proceed to prove this proposition to demonstration, by evidence of the most unimpeachable sort. So overwhelming is the mass of evidence on this point given before the Devon and other Commissions, that my sole trouble is that of selection. It meets one at every turn of the page. It is testified to by landlord and agent, by farmer and trader. But so fundamental in any argument touching the tenant-right of leaseholders is this fact, that I feel it should be attested by evidence which must compel the assent of the most hesitating and sceptical.

The lease for lives continued the usual lease until 1832, when a lease for years first gave the right to register. Before that date leases for years alone were all but unknown in Ulster; they were rare in any part of Ireland.

In Wakefield's *Account of Ireland* will be found an interesting statement of the length of leases then granted in the several counties of Ireland. From it I have made the following extracts referring to the Ulster counties:—

ANTRIM.—Leases are all for life or lives with concurrent term of years, 21 or 61.

ARMAGH.—Leases for 21 years and one life.

CAVAN.—Leases for 21 or 31 years, and a life or lives.

DONEGAL.—Leases all for life or lives and years, except Lord Donegal's, which "are for 61 years; but he constantly renews on a fine, otherwise his rents would be enormous."

DOWN.—Twenty-one years and one life.

FERMANAGH.—Three lives or 31 years; of late, 21 years and one life.

MONAGHAN.—Twenty-one years and a life or three lives.

TYRONE.—"The Marquis of Abercorn has only a life interest, and therefore he grants a lease of years and a life, but under the condition that it does not exceed his own.\* Lord Belmore grants leases for three lives; Lord Northland, for 21 years and a life; Mr. Staples, for 31 years and three lives."—(From Wakefield's *Account of Ireland*, Lond. 1812, Vol. i., 245-285.)

In the *Statistical Survey of Down*, from which I have already quoted, it is stated that on the expiration of middlemen's leases, "the under-tenants were taken as tenants by the landlord, who thus answered two purposes—one, of providing for those already on their estates; and the other, of *increasing their interest by the number of freeholds*" (p. 40).

Townsend, in his *Survey of Co. Cork*, says—"Parliamentary influence is very much looked to in all leases, consequently every proprietor has an army of freeholders" (p. 468).

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\* See *post*, p. 28.

Before the Committee on the State of Ireland, 1825, Hugh Wallace, Esq., of Downpatrick, alleged that “at the expiration of leases of any large tracts of ground, several of the landlords of the county, *for the purpose of creating freehold interests in the county, cut the farms up into small parcels*; where a farm was formerly held by one person, of perhaps fifty or sixty acres, the landlord would cut it up into tenures for three or four persons. I also observed, and I conceived it was done with the same view, that the landlords, in place of availing themselves of the opportunities afforded by the clauses against alienation and subletting, which were usually contained in the leases, encouraged their tenants to cut up the farms that were in their possession, under the leases; and almost encouraged them, whenever the son or daughter of any large landholder was married, instantly to make a provision for that branch of his family so as to create a freehold.

“Was the object of the landlord to make subtenant freeholders?—Yes” (Part I., p. 144).

But the best evidence I can adduce is that of an Act of Parliament—a personal Act of 1821—viz., 1 and 2 Geo. IV., c. 42, entitled an Act for granting leasing powers to the guardians of the Marquis of Abercorn. This Act recites a settlement of 30th December, 1786, which gave the tenant for life of the Abercorn estates in Tyrone and Donegal a power of leasing, confined to twenty-one years for agricultural lettings, but allowing in the case of building leases, a term of three lives or thirty-one years, provided £4 of derivable rent therefor were reserved. But it appears to have been soon found that a lease for twenty-one years, having no political significance, was worthless; for under a power reserved in the settlement, a deed-pole was executed on 20th

December, 1789, which declared new leasing powers "for one, two, or three life or lives, or for any number of years determinable on the death or deaths of one, two, or three persons." The Act then proceeds to state the extent to which this leasing power was exercised. "Whereas the said John James, late Marquis of Abercorn, during his life, in execution of the powers contained in the deed of 1789, *had executed leases of all the said manors and lands for a term of years with lives concurrent*, with a covenant therein that the tenant should hold the premises by each lease demised for and during the natural life of the persons in such leases named, and for and during the natural life and lives of such other person or persons as the said John James, Marquis of Abercorn, should or might think proper to add or insert to the term of the said demise, within the number of years for which such lease was granted." Due care was thus taken to keep in existence the lives, which gave the only value—*i.e.*, the political—to the lease. But it was found, as further stated in the preamble, that the then guardians of the Marquis of Abercorn, who at the date of the Bill was a minor of the age of ten years, "*had no power to grant freehold leases, or insert new lives in the leases granted by the former Marquis, in which the term of years was unexpired;*" and therefore "*whereas the lives in several of the said leases are dead*"—it is enacted that the guardians of the Marquis of Abercorn, the Earl of Aberdeen, and the Bishop of London, should have *power to grant leases for one life or eleven years ; and to add one new or other life to the leases for which the term is unexpired, in the room and stead of the life and lives which have dropped or may hereafter drop.*"

Can anything be clearer than that the new leases for "one life or eleven years," or the old leases to which the years being unexpired a new life was to be added, which could not last beyond the years, were purely political documents, without the slightest commercial significance? The lease for a life or eleven years would keep up the roll of freeholders until the Marquis came of age, who had power to grant freehold, *i.e.*, political leases; and the addition of the life to the old leases, which must not extend beyond the term of years, could have no other object than to create votes.

Thus, it appears that universally through Ulster in the beginning of the century the lease was a lease for lives. Again we find social economy bending and accommodating itself to politics.

*The commercial lease for a fixed term of years had no existence till comparatively recent times: the political lease for lives was alone in fashion.*

## SEC. II.—*The Later Evidence.*

THE evils of subdivision have been too often charged to the account of the Irish tenants, by writers who have not thoroughly investigated the facts. The truth is, the tenant was not half as desirous of dividing his farm as the landlord was, of doubling his votes. For the purpose of making freeholders, to borrow the striking language of Col. Blacker, he "cut his property into ribbons." The political temptation was, no doubt,

strengthened by economic considerations. The war prices enabled the occupiers to make largely increased profits. The depreciation of the currency, which commenced in 1798, owing to the restriction on cash payments, and which even in 1801–1803 was fully 13 to 16 per cent., added largely to the profits of farmers holding under fixed rents. Under the double action of war prices and a depreciated currency, the subdivision which the landlord encouraged was possible, and not unacceptable to the tenant. The Land Occupation Commissioners of 1843–1845 frankly admit this fact. “The 40s. franchise,” they say, “was by the Act of 1793 extended to Roman Catholics; the landlords and middlemen then found the importance of a numerous following of tenantry, and subdivision and subletting, being by this law indirectly encouraged, greatly increased.” And what say the sworn witnesses before this Commission? *Ex paucis disce omnes*. Out of the multitude I select a few.

Joseph Kincaid, Esq., partner in Stewarts and Kincaid, one of the first witnesses examined before this Commission, speaking of Lord Palmerston’s estate in Sligo, for which he acted as agent, said—

“It was the custom on that estate 50 or 60 years ago to grant leases for lives and years. About 20 years ago, it being an object with his lordship *to make freeholders*, he granted a number of leases for 21 years or two lives, *to enable the tenants to register freeholds*. The tenants have not taken any of the leases, although they have only to pay the stamp duty, so little value do they put on them. He then gave 300 leases, under which the tenants voted. . . . About two or three years ago, we tried to get the tenants to take up leases to register £10

freeholders. The only answer they gave his lordship was, that if he gave them an abatement of £10 a year, they would register"—(Evidence before Land Occupation Commission, Vol. i., p. 30-32).

Now, let it be observed that Lord Palmerston's was a tenant-right estate. Mr. Kincaid stated that the custom was recognized on the estate, but "not at all to the extent to which it was recognized in the north." I am bound, however, to say that Lord Palmerston's tenant-right, as described by Mr. Kincaid, is as large and unrestricted a tenant-right as is to be found in Ulster. The tenants were allowed to sell without limitation of the price; the arrears of rent were deducted from the purchase-money; and if the landlord wished to resume possession, he must pay for the tenant-right or give another holding to the tenant—(*Ibid.*, p. 33).

Of Lord Longford's estate, of which also Mr. Kincaid was agent, he says:—

"The system of leasing upon Lord Longford's estate has been chiefly for the purpose of making freeholders. Leases were granted to a great majority of the tenants, commencing from the month of May, 1822, for 21 years and two lives concurrent"—(*Ibid.*, p. 55).

Richard S. Guinness, Esq., of Dublin, land agent, speaking of Mr. Malone's estate in Westmeath, the rental of which was £10,000 a year, said:—

"Almost all the tenants hold upon lease. . . . The greater part of them were made *preparatory to the general election of 1826*.

"What is the term of the lease? Generally three lives or 31 years"—(*Ibid.*, p. 40).

Richard Beere, Esq., land agent, states that on Mr. Armstrong's estates, in Tipperary, *the recent leases were for 21 years*—(*Ibid.*, p. 273). All the evidence quoted from the Devon Commission was given in 1843-4.



John Donnellan Balfe, Esq., county Meath, says:—

“What is the ordinary term of a lease? 21 years.

“Without a life? Yes, *without a life; when it was the custom create voters they put in a life*”—(*Ibid.*, p. 262).

Richard H. Dolling, Esq., speaking of Down, Armagh, and Antrim, says:—

“On large estates there have been *many leases granted on account of making freeholds*. Ever since the 40s. freeholders have been abolished every man has been trying to consolidate the farms”—(*Ibid.*, p. 471-2).

John Andrews, Esq., agent of Lord Londonderry, says:—

“Leases are now granted for 21 years and no lives”—(*Ibid.*, p. 545).

Thomas Davison, J.P., agent for several estates in the baronies of Upper and Lower Glenarm, Carey, and Upper and Lower Dunluce, in the county of Antrim, says:—

“*Formerly the tenure was lives and years—three lives and 31 years, or 21 years and one life. Latterly all leases granted upon these estates have been for terms certain, generally for 21 years*”—(*Ibid.*, p. 595).

A. Spotswood, Esq., agent for the Bellaghy, Castle-dawson, and other estates in county Londonderry, says:—

“Immediately after the passing of the Reform Act 240 of the tenants on the Magherafelt estate came forward to register.

“Had the proprietors the power of granting such leases as the tenant could register upon before the Reform Bill opened the franchise to tenants holding for years? No, they had not: they could not grant a life”—(*Ibid.*, p. 669).

David Cather, Esq., of Newtownlimavady, county Derry, says:—

“When the £10 franchise was made there was a good deal of consolidation, *in order to make voters*”—(*Ibid.*, p. 716).

John B. Beresford, Esq., agent of the Marquis of Waterford's estates in county Derry, says:—

"The tenure is generally by lease. Formerly it was for 21 years and a life; *latterly he has discontinued the 'life'*"—(*Ibid.*, p. 719).

Rev. R. Gray, P.M., of Burt, county Donegal, says:—

"On the Burt section of the Templemore estate the leases are for 31 years, commencing November, 1836"—(*Ibid.*, p. 688).

Charles H. Kennedy, Esq., land agent, says:—

"On Sir Charles Style's estate in Donegal the leases granted since 1838 were for 21 years"—(*Ibid.*, p. 979).

Alexander Hamilton, Esq., land agent to Colonel Conolly, county Donegal, says:—

"Leasing is a matter of rare occurrence, except when done for political purposes"—(*Ibid.*, Vol. ii., p. 181).

Robert M'Crea, Esq., Grange House, Strabane, county Tyrone, says:—

"Those interests which are supposed to entitle them to register a £10 freehold, get leases; the others seldom. There has been a disposition to consolidate the very small farms since the passing of the Reform Bill, *in order to register £10 freeholds*.

"Is the subletting or subdividing of farms carried on at present? No, there has not been anything of that kind *since the abolition of the 40s. freeholders*. It was encouraged to such a degree that some of the landlords were angry if a farmer sent any of his sons to America, and did not locate them upon the farms"—(*Ibid.* Vol. i., pp. 753-5).

Mr. Francis O'Neill, of Mountpleasant, county Tyrone, says:—

"Generally the tenant holds for 21 years and a life, *when qualified for a freeholder*. Others will not qualify and hold at will."—(*Ibid.*, p. 763).

Joseph J. Byrne, Esq., land valuator, says:—

"On Sir James Witshed's estate in county Meath, they *lately got leases of 21 years*"—(*Ibid.*, p. 257).

Henry L. Prentice, Esq., Lord Caledon's agent, says:—

"The 40s. freehold did a great deal of harm in this country, by cutting up the land for political purposes, which was at one time encouraged by the landlords"\*—(*Ibid.*, p. 841).

Mr. Samuel Glasgow, of Killycurragh, co. Tyrone, says:—

"There was a time when the agent would not let them hold land without taking a lease. When I first became a farmer it was so. I got a lease in 1815"—(*Ibid.*, p. 676).

Mr. Richard A. Minnitt, agent to properties in Cavan and Monaghan, says:—

"The leases on our property generally were made in the year 1824. . . . They are for 21 years with a life for each townland to every tenant"—(*Ibid.*, p. 902).

Mr. Edward M'Cabe, farmer, county Monaghan, says:—

"Any one supposed to be able to get a vote got leases; the rest did not"—(*Ibid.*, p. 915).

Mr. T. M'E. Gartlan, county Monaghan, says:—

"The country was generally under lease, until very lately."—(*Ibid.*, p. 918).

William Ford, Esq., land agent and Sessional Crown Solicitor, county Meath, says:—

"Every man had a lease about the year 1800. From 1793 an immense number of leases were granted to Roman Catholics, when the elective franchise was extended"—(*Ibid.*, p. 878).

Rev. James Porter, P.M., of the barony of Upper Iveagh, co. Down, says:—

\* A very intelligent gentleman, Mr. Mayne Campbell, of Tanagh, Caledon, says:—

"About the year 1833 or 1834, the late Lord Caledon, then Lord Alexander, contested the county; the old leases on the Caledon estate, which were for 3 lives or 31 years, were then, most of them, in existence; but in any cases in which they had fallen in new ones were granted for 1 life or 21 years, and they were given for the purpose of making votes for Lord Alexander"—(Communication to the author, 1st June, 1872).

"The tenure was always by lease upon some lands, until the franchise was altered from 40s. to £10"—(*Ibid.*, p. 398).

Captain Edward Archdall, J.P., D.L., landed proprietor, county Fermanagh, says:—

"The tenants hold generally by lease."

"What is the time? On our property it is *now twenty-one years*; formerly three lives, or thirty-one years; it is *now twenty-one years without a life*. . . .

"Is the sub-letting and sub-dividing carried out to any extent? No, not now; the injury was all done at the time of the 40s. freeholders"—(*Ibid.*, Vol. ii., p. 139).

Lieutenant-Colonel Blacker, landed proprietor, county Armagh, says:—

"A few years ago, when the 40s. freeholder system prevailed, several large *properties were cut up into ribbons to make 40s. freeholders*. There is now a backing out of that system"—(*Ibid.*, p. 455).

It is a canon of inductive logic that whenever an effect varies as its alleged cause varies, that alleged cause may be regarded as the true cause or as at least proceeding from the true cause. The concomitance of the variations in the qualification for the franchise with those of the term in leases points unerringly to the political character of the lease.

The system of creating freeholders for electioneering purposes was not confined to times of contested elections. The predominant landowners saved themselves from the electoral war by keeping up a powerful standing army of freeholders, ready to follow to the polling booths the colours of their lords, if an ambitious neighbour were reckless enough to provoke a contest.

Evidence to the same effect might be multiplied to any extent. Enough, however, has been given to convince the most sceptical.

The sum of the foregoing evidence is this:—

1. *Up to the time of the Devon Commission, 1843-44, the ordinary lease was regarded in no other light than as a qualification for the franchise.*

2. *It ceased to be granted in cases of very small holdings in 1830, when the 40s. freehold franchise had been abolished.*

3. *After 1832, leases for years became common, though not exclusively, for the freehold franchise still remained, though leases for years were then first recognized as giving a qualification.*

## CHAPTER VI.

### COVENANTS IN POLITICAL LEASES.

PERHAPS nothing more clearly demonstrates the nature of the ordinary Irish lease than the indifference of the landlord to its contents. Mr. Guinness, whose evidence has already been referred to, was asked whether upon the Malone estates, in Westmeath; the leases contained any particular covenants, for instance covenants against alienation. He replies:—

“Yes, I rather think they do. In Ireland it is not the practice of the land agent to prepare leases; it is done by the law agent.

“Do you examine the lease to ascertain whether there are particular covenants?—No, not generally.

“You said you were connected with the management of large estates in Galway?—Yes.

“Is the course of management much the same there in respect to leases?—It is very much the same”—(*Ibid.*, p. 42).

Wakefield says:—

“Of clauses in leases, I am acquainted only with one which is enforced, more in Connaught than in any other province in Ireland,

but it is far from being general. It is that which binds tenants to work for their landlords at a given rate of wages"—(*Wakefield's Account of Ireland*, Lond., 1812, Vol. i., p. 285).

Thomas Murray, Esq., agent to the Marquis of Downshire, says:—

"The leases were formerly for 3 lives or 31 years. There are many covenants that are never enforced. His leases are copies of a very old lease made by the Marquis of Downshire sixty years ago"—(*Land Occup. Com. Rep.*, Vol. i., p. 590).

J. L. W. Naper said:—

"I am not aware that I have ever attempted to enforce a single clause in a lease."—(*Ibid.*, p. 122.)

Sir Percy Nugent says that the old leases for lives which he found in existence when he succeeded to the property of his grand-uncle, Sir Percy Nugent, were

"In a particular form, as they contained *clauses for making cider orchards* under severe penalties; and it was clear that for a man living at the top of a mountain, or in a bog, it would have been a bad speculation to have compelled him to plant orchards, and yet you will find in some of these leases a very heavy penalty is incurred by not doing it, and that the tenants have forfeited every right under the lease"—(*Ibid.*, p. 285).

Maurice Wilson Knox, Esq., of Rosemount, barony of O'Neilland West, co. Armagh, landed proprietor, says:—

"The covenants vary a good deal; but I *never knew any of them insisted on.*"—(*Ibid.*, p. 429.)

C. J. Knox, Esq., stated that on the estate of the Goldsmith's Company, in the neighbourhood of Derry [since sold in the Incumbered Estates' Court],

"About four-fifths are let on leases, made in the year 1781 and 1787, for 71 years or 3 lives whichever should longest last. There were no clauses relative to subletting or dividing; *there is no clause to resume possession*; there is no clause to keep buildings in repairs"—(*Ibid.*, p. 705.)

J. Duckworth, Esq., J.P., county Sligo:—

"I never heard of a breach of covenant being enforced"—(*Ibid.*, Vol. ii., p. 238).

It is to be remembered—it helps to explain the disregard of the covenants—that the lease was generally a printed form, which was used indifferently in the high and low lands, for large and small farmers. There was no discussion of its covenants permitted: the tenant must accept it as it stood, or incur his landlord's displeasure by depriving him of a vote.

Can anything be clearer than that these leases which the law agent prepared with what covenants the English form which he copied contained, but which the land agent seldom saw, were not the commercial contracts now known in England and Scotland by the same name? Leases with covenants which no landlord ever thought of enforcing, save the one covenant to pay the rent; leases with covenants to make cider orchards in the bog of Allen, under penalty of forfeiture, do not exactly come up to our ideas, derived from English and Scotch precedents, of strict contracts defining precisely the mutual rights and obligations of the parties. The rent was an important consideration for both landlord and tenant; the tenure for the former,—for it was of essential importance that it should confer the franchise. The covenants satisfied the notions of the attorney; they never entered into the ideas of the parties. After 1829 the covenants against alienation, sub-division, and the erection of cottier houses became a reality; but in this respect the lessees fared no worse than the yearly tenants. I may sum up this chapter in the following propositions:—

1. *The covenants were generally settled by the law agent, often not even seen by the land agent.*

2. *They were occasionally impossible; and, when possible, rarely, if ever, enforced.*

3. *The lessee, in respect of them, fared no better and no worse than the yearly tenant.*

## CHAPTER VII.

### INDIFFERENCE OF ULSTER TENANTS ABOUT LEASES.

THE lease was in truth a matter of indifference to the tenant.

Robert Russell, Esq., agent of the Marquis of Conyngham's estate, county Donegal, says:—

"The tenants have no wish to take leases; they consider their title as good as if they possessed them"—(*Ibid.*, Vol. ii., p. 164).

Mr. John Crummer, farmer, parish of Killemar, county Donegal, says:—

"Thirty years ago the people were partly obliged to take leases, and many of them have not lifted them out of the agent's office, though they paid for them."—(*Ibid.*, p. 159).

The puzzled hesitation of Mr. Pringle, a farmer on Lord Caledon's estate, as expressed in his evidence on this matter, is as expressive as it is amusing. (See *post*, p. 70).

"Few would go to the expense of taking leases up" is the evidence, as to Lord Caledon's estate, of Maurice Collis, Esq., *ibid.*, Vol. i., p. 249; see also evidence of T. J. Atkinson, Esq., land agent, county Donegal, *ibid.*, Vol. ii., p. 173; of John Andrews, Esq., *ibid.*, Vol. i., p. 545; and of John Wray, Esq., land agent, Dungannon, *ibid.*, p. 445. "They were indifferent about leases" (Evidence of John Waring Maxwell, Esq., of Finnebrogue,



county Down, *ibid.*, p. 516; of Andrew Spotswood, Esq., *ibid.*, p. 666; of Rev. John Brown, D.D., Aghadoey, county Londonderry, *ibid.*, p. 631; of Samuel Orr, Esq., Flowerfield, Coleraine, *ibid.*, p. 642; and of Fitzherbert Filgate, Esq., *ibid.*, p. 880).

The reasons for this general indifference as to holding by lease on the part of the Ulster tenants (for it by no means extended to the south and west), were various. Prices fell after the cessation of the war, mainly owing to the depreciation of the currency being suddenly corrected by bank failures.\* This led to the ruin of many tenants who, in the interval of depreciation and of high prices, had taken land at what were afterwards called "war-rents." The period of low prices was of long duration. Between 1817 and the date of the Devon Commission there were many years of agricultural distress. In 1821 not only were prices of agricultural produce extremely low, but in that year there was a failure of the crops, causing such distress that "out of a population of 230,000 in Kerry, 170,000 were left destitute, without the means of subsistence" (*Report on State of Poor in Ireland*, 1830, p. 11). 1818 and 1828 were years of high prices, followed by periods of re-action. In 1834 and 1835 prices were very low, and in 1842 and 1843 large abatements in rents were made. James Anderson, Esq., of Castlederg, county Tyrone, agent for several estates in Tyrone and Donegal, stated that on the expiration of leases granted in 1797, at the re-valuation in 1840, he had lowered the rents  $2\frac{1}{2}$  per cent. upon those old leases (*Land Occupation Com. Rep.*, Vol.

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\* See *post*, Appendix B.

i., p. 807). Mr. Prentice, Lord Caledon's agent, stated that one-fourth, and afterwards one-tenth, had been struck off the general valuation of the estate in 1814, "to meet the times" (*ibid.*, p. 858). The changes in the tariff also produced great uncertainty. Hence, tenants were loath to enter into lengthened contracts.

On the other hand, the prospect of another season of "war-rents" made landlords indifferent about granting leases. "They recollect," said Mr. Ford, "that they had not the benefit of the war prices: the lands were then leased out"—(*ibid.*, p. 878). The reason was as old as Spencer:—"The reason why the landlord will no longer covenant with him is for that he daily looketh after change and alteration, and hovereth in expectation of new worlds"—(*View of the State of Ireland*).

The introduction of a Poor Law into Ireland in 1838 was an additional motive with the landlords to refuse leases. They found it easier to check sub-division and the "inconvenience of a redundant pauper population" by the notice to quit in the case of yearly tenants than by action of covenant on the lease.

Landlords managing their estates on commercial principles would have been swayed by these considerations, and in this period of common indifference no leases, or leases for short terms of years only, would have been granted. But political considerations turned the scale, and leases were granted, as we have seen, with franchise-giving tenures.

But here let us note the difference in the south after the "revolt of the freeholders" in the Clare election. That political and religious considerations induced the landowners of the south to refuse leases, as the same considerations led the Ulster landowner to grant them,

is proved by many witnesses examined by the Devon Commissioners (see evidence of Lambert Disney, Esq., land agent; William Ford, Esq., James Hughes, Esq., J. D. Balfe, Esq., and John Jagoe, Esq.) Up to this date (1843) there had been no effectual disruption of political ties between landlord and tenant in the tenant-right districts of Ireland.

An anxiety for leases is the usual expression of the southern tenant-witnesses, except on a few estates here and there managed on tenant-right principles; while the common expression of the northern tenant-witness is one, not of anxiety to get or a dislike to take leases, but of absolute indifference. I cannot illustrate this better than by quoting the evidence of the Earl of Mountcashel, who then owned estates in the Counties of Cork and Antrim.

"It is a very curious thing, though I reside on my county Cork estate, I have much larger estates in the county of Antrim, and I have been in the habit of acting in the same way towards my northern tenants and towards my southern, and *my northern tenants do not wish to take leases, as far as I have found*"—(*Ibid.*, Vol. iii., p. 152).

The only tenants in the north who in 1843-4 were not indifferent about leases were those who held under landlords who did not fully respect the tenant-right, who were consolidating farms otherwise than through the gradual operation of the custom, or who were raising rents at shorter intervals, or to a greater amount than the custom warranted. Thus Captain James Robinson, land agent for the extensive estates of Mr. Hall and Mr. Ross, in Armagh and Down, when asked whether the tenants showed an anxiety to obtain leases, answers:—

"Yes; in some districts. If they have not as much confidence

in the landlord on one estate as another they are desirous to get better security"—(*Ibid.*, Vol. i., p. 429).

Mr. John M'Carten, agent for Dean Waring's estates, county Down, says:—

"I would myself as soon not have a lease as have one, if the tenant-right is acknowledged. *If the landlord denies the tenant-right the tenant is better with a lease; if it is acknowledged it makes no difference*"—(*Ibid.*, p. 463).

John Pearse Hamilton, Esq., J.P., agent to Lord Erne and other proprietors, county Fermanagh, says:—

"On Lord Erne's estate the tenure is generally at will. . . . When there is a landlord whose character is such as not to stand high in the estimation of the tenants the want of leases has of course a very prejudicial effect, inasmuch as it goes to check improvement; on Lord Erne's estate it makes no difference.

"Are they anxious to obtain leases? No; I cannot say that they are"—(*Ibid.*, Vol. ii., p. 130).

Occasionally there were special reasons which induced tenants, even in the north, to desire a lease. "There is a greater facility of borrowing money under a lease," says John Hancock, Esq., J.P., (*ibid.*, p. 483). "If they were in distress, and wanted any accommodation, they could get it easily when they had the property by lease" (Evidence of Mr. A. O'Flinn, farmer, Castlewella, co. Down, *ibid.*, p. 581). So, "where there were family arrangements, where the eldest son was going to get married, they sometimes came and asked for a lease in that case" (Evidence of F. Filgate, Esq., *ibid.*, p. 880).

The advantage of legal security, however, only existed in the case of a large farm, and even then when the sum desired to be secured was considerable. A tenant of a small farm, or one desiring to borrow money in small sums, was better without a lease, owing to the cost of legal proceedings. Where there was no lease

the agent was at liberty to deal with the case, to settle the claims of creditors, and of legatees, and to enforce payment of their just demands, by a document as effective as the writs of execution or attachment of the law courts—the notice to quit. The remedy in “the office” was cheap and expeditious. The agent’s was a local jurisdiction, with “an equities clause” of the most extensive kind. He was free from the legal technicalities of the law of judgments which in the constituted tribunals so often barred honest claims, hampered by no decisions as to priority and proper registration, and looking solely to the equities of the case. Lenders of small sums had every motive to prefer the moral security of the yearly tenant to the legal security of the lease. Hence, in all ordinary cases on a fairly-administered tenant-right estate, there was no reason why the tenant should desire a lease. The rent of a yearly tenant was only changed at intervals usually as great as the common term of a lease; and if, on the one hand, the leaseholder had a certainty against increase of rent so long as his lease ran; on the other hand, he, owing to the complications of title affecting the tenants’ interest, was often unable to make a valid surrender so as to secure the abatements allowed to the yearly tenant in bad times. As to this, the evidence of Alex. Hamilton, Esq., the agent of the Conolly and other extensive tenant-right estates in co. Donegal, is very suggestive.

“Unless there be gross misconduct, the tenants at will enjoy with us as certain fixity of tenure as if they were possessed of leases. Though not expressed, it is well understood that every new letting is for a period of twenty years. . . . So small is the value attached to so limited a tenure as twenty years, that they would rarely be found willing to pay even the expense of stamps, if they

got the leases prepared gratuitously. In confirmation of this, I may state that in several instances, where leases were granted with a view to political purposes, and where the tenants failed to establish their right to the franchise, they subsequently proposed to surrender their leases rather than defray the attending expenses" (*Ibid.*, Vol. ii., p. 177).

So, before Lord Clanricarde's Committee, 1867, Mr. Russell, agent of the Marquis of Conyngham's estates in Donegal, said "It is almost an understood lease of 20 years."

The lease meant nothing more than a yearly tenancy to either landlord or tenant, except in its political aspect. It only expressed what was implied and "well understood" in every yearly letting—fixity of rent for a term corresponding with the period during which the rents of yearly tenants remained unaltered, and, in later times, the determination not to permit subletting and subdivision. The lives that were introduced to qualify for the franchise were of little value. They introduced into the transaction the uncertainty of a lottery.

Such is the historical character of the ordinary Irish lease. Exceptions, no doubt, there were and are. Land in Ireland has been and is occasionally let, with its buildings and all the necessary appliances of a "furnished" farm supplied by the landlord, to a capitalist tenant who has paid no "input," and had no claim upon it, derived from improvements or immemorial connexion with the soil. The lease of such a tenant may well be regarded as a strict commercial contract. But such leases are rare. I am dealing not with the units, but with the tens of thousands; and these were assuredly not instruments framed to define the strict terms of a commercial contract between parties keenly alive to their respective pecuniary interests—not at rents determined by competition, and

the sharp action of demand and supply—not for a period strictly measured beforehand, so that at its termination the mutual advantages of landlord and tenant should have nicely balanced one another, and both cry “Quits;” but instruments framed by the law-agent to make voters, with whatever impossible or possible clauses the precedent he copied from suggested, on terms not less favourable to the lessee than those enjoyed by the ordinary tenant-at-will, so that the landlord could count securely on the tenant’s sympathetic vote. The object of the lease would have been defeated if the enfranchised leaseholder had been placed by its acceptance in a worse position than the unenfranchised tenant-at-will. What was the vote to the tenant that, for a mere fixing of rent for a period which was totally uncertain, so far as it differed from the understood term of a yearly letting, and as likely to tell against as for him—such were the uncertainties of war and peace, of a varying currency, of Corn Law legislation changing with Cabinets, long menaced and at last overthrown by the advocates of a new science—he should barter away his hold upon the soil and the improvements he alone had made; whilst, by continuing a yearly tenant at a rent which it was “well-understood” should not be altered during a period as long as the usual term in a lease, he could retain his hold upon both, protected by the equitable dealing of his landlord and the old custom of tenant-right?

This chapter I sum up as follows:—

1. *The Ulster tenant was indifferent about a lease; except for special reasons, as*

*A. On estates where tenant-right was denied, or infringed upon :—*

(a) *Where his landlord was consolidating farms otherwise than through the gradual operation of tenant-right.*

(b) *Where he increased the rent of yearly tenants to a greater amount or at shorter intervals than was customary.*

*B. On full tenant-right estates :—*

(c) *Where the tenant wanted the lease as a legal security on which to raise a considerable loan, or execute a marriage settlement.*

2. *The Southern tenant, where tenant-right was not admitted, was anxious for a lease.*

3 *The Ulster tenant did not object to take a lease, if his landlord desired he should, in order to qualify for the franchise.*

4. *The Ulster landlord was anxious to give all his tenants leases, until the policy of consolidation took the place of that of subdivision.*

(a) *When the 40s. freeholder was abolished, and his farm was consolidated.*

(b) *When the Poor Law was introduced.*

5. *The Southern landlord, after the Clare election, refused, for political reasons, to give leases; and he was encouraged in this by the introduction of the Poor Law.*

6. *These facts suggest the hypothesis that the lease in Ulster was not considered an extinguishment of the custom.*



## PART II.—THE QUESTION OF FACT.

## CHAPTER I.

THE EARLY APPLICATIONS OF THE TERM  
TENANT-RIGHT.

As a matter of fact, did the Ulster tenant-right custom before its legalization apply to leased lands? Or, did the lease *ipso facto* extinguish the custom? Had the tenant at its termination a tenant-right interest which was customarily respected? Or, did the landlord on the fall of the lease eject him from his farm, without giving him the benefit of the custom?

I have now to deal with facts, not words. And yet words are not without their lessons. It is not without its significance that the first use of the word "Tenant-Right" which I have been able to discover is in connexion with the customary claims of lessees, on the expiration of leases. In 1768 there was reprinted in Dublin the third edition of a remarkable pamphlet by Everard Fleetwood, Esq., which had been originally printed in London, entitled "An Inquiry into the Customary Estates and Tenant-Rights of those who hold Lands of Church and other Foundations, by the Tenure of 3 Lives and 21 Years." It contains the best disquisition on the binding form of custom as a part of the law—*altera lex*—to be found in any of our law books. Very analogous to the customary claim of tenant-rights in church lands, as put by Fleetwood, was the Ulster tenant's claim on the expiration of leases. The "tenant-right of renewal" is a phrase long familiar to lawyers.

In *Rawe v. Chichester* (Ambler's Reports (p. 719), decided in 1773; and in *Lee v. Vernon* (5 Brown's Parliamentary Cases, p. 14), decided in 1776, it occurs as a familiar phrase. In 1670, the thing, though not the word, makes its appearance in *Holt v. Holt* (1 Chancery Cases, 190). Butler, in his edition of Coke upon Littleton, says—"The favour which is shown to old tenants, by granting them a renewal of their leases, preferably to a stranger, has given them *in the eye of the law an interest beyond their subsisting term*; and this interest is generally termed their *tenant-right of renewal*. This is particularly applicable to leases from the crown, from the church, from colleges, and from other corporations"—(Note 249).

Another use of the term "tenant-right" is to be found in English law books. Lord Ellenborough, in *Doe d. Ray v. Huntington*, spoke of customary estates known by the denomination of *tenant-right*, and peculiar to the northern parts of England, in which "border-services against Scotland were anciently performed" (4 East's Reports, p. 271). In 1665, this form of tenant-right custom received judicial sanction in *Newton v. Shafto* (Siderfin's Reports, p. 267). What was the particular nature of this tenant-right, the origin of which was traced to the border wars, is not of importance in our present inquiry. Nor need we pause over the modern English use of the word "tenant-right" to indicate those modern agricultural usages which enable an outgoing tenant to recover from the landlord or the incoming tenant compensation for tillages, manures, and other farming works, in some districts including drains, and (as in Kent) even buildings. The Ulster tenant-right is none of these, though it partakes of the character

of all three. It is sufficient to note that the word is in early use in England; that it may have been introduced by the English settlers of the Ulster Plantation; and that it certainly first appears in either legal or political literature in Ireland in connexion with the claims of lessees on the termination of their leases.

In one of the ablest economical treatises of his time, Dr. Crumpe, of Limerick, condemns the system which obtained in the south of Ireland, of advertising lands, when a lease expired, to be let to the highest bidder; and he recommends the adoption of the English system, according to which, as he says—

“When a lease is expired, a third person scarcely ever interferes; the former occupier is supposed to have what is called a *tenant-right* to the premises. He is content to pay a reasonable advance for the improved state his farm may have arrived at; the landlord accepts the customary proportionate increase; and these customs, according to Adam Smith, ‘so favourable to the yeomanry, have contributed more to the present grandeur of England than all their boasted regulations of commerce taken together’” (*Essay on the Best Means of Providing Employment for the People*, Dubl. 1793, p. 231).

Dr. Crumpe was a native of Limerick, and not at all acquainted with the north of Ireland, as he candidly tells us (*ibid.*, note, p. 251); and so his observations have no reference to the custom of Ulster. There he might have found, without crossing the Channel, a precedent to his mind. Land in the north was never, nor is it to this day, let by competition.

Fraser, who had probably read Dr. Crumpe’s work, in his *General View of Wicklow*, Dubl. 1801, says—

“In the whole of my Lord Fitzwilliam’s property *what is called in England tenant’s right* is universally respected; a third person seldom interferes. The former occupier, or his heir at law, or even his devisee, is supposed to have a tenant-right to the premises. He is content to pay a reasonable advance for the improved state at which

his farm may have arrived, deductions being always allowed for permanent improvements" (p. 118).

The tenant-right system which Crumpe and Fraser described, prevailed then in Ulster as it does now, with this addition, which, though really exceptional, has attracted so much the attention of outside observers as to be taken for the special characteristic of the custom—the right of the tenant to dispose of his tenant-right interest, when circumstances forced him to leave his farm. We can easily account for the addition by the exceptional circumstances, and the different laws of the two countries. The seller of tenant-right has generally been a person in insolvent circumstances; and his rent was largely in arrear. Thus, W. Steuart Trench, Esq., agent to immense tenant-right estates in Monaghan and Kerry, stated before the Lords' Committee on the Tenure (Ireland) Bill, 1867, that he only knew of two or three cases in his extensive experience where tenants who were not insolvent and in arrear had sold their tenant-right (*Digest of Evidence*, p. 7). Insolvency, in a backward country like Ireland, with a population dependent solely on industry, liable to great vicissitudes, and degraded by misgovernment, was a thing of frequent occurrence. After the war, it was especially so. This was the time when tenant-right attracted attention. The right of sale was seen in open operation. The right of continuous occupation at a fair rent, and the right of transmission by will, or on intestacy, far more frequent, were unobserved. Hence the prominence attached to the right of sale.

There was another circumstance which gave origin to the determination by sale of the value of the tenant-right. The good-will element of the Ulster Tenant-

right—its most striking peculiarity—was due to a difference in the laws of the two countries. The English Poor Law is as old as the time of Queen Elizabeth. The Irish Poor Law only dates from 1838. The Ulster landlord, admitting that his tenant had a tenant-right in his occupation above the improvements, which had its money value, allowed that value to be realized, when the tenant's means were gone, and he had to quit his farm, in what was the most gracious and least arbitrary way—by sale. He had no principle to determine the value of the good-will, except by open sale. By this he got in the arrears, and obtained a solvent for an insolvent tenant. The surplus saved the tenant from starvation, and enabled him to move to a town or some new industry, and, at a later date, to emigrate. The poverty of the tenants, and the want of a Poor Law in Ireland were in all probability the originating causes of the right of sale (see, on this point, the admirable speech of Lord Lurgan, second reading of Land Bill, House of Lords, 17th June, 1870, a portion of which is quoted in my *Guide to the Land Act*, p. 81.)

From this historical review then it appears that—

1. *The tenant-right of England in the 17th and 18th centuries was exclusively claimed on behalf of lessees who had "customary interests beyond the lease."*
2. *The tenant-right of renewal, which Courts of Equity recognized, was confined to the same class.*
3. *The tenant-right of Irish writers on the land question at the end of the last and the beginning of the present century had exclusive application to the same class.*

To any one bearing these facts in mind, it will not be matter of surprise to find that in more recent times,

when the Ulster tenant-right became a matter of Government investigation, before the Devon Commission in 1843-4, who took an immense body of evidence on oath in every district, and in 1869, when the Poor Law inspectors made minute inquiries of the guardians, *ex officio* and elected, in every Union in Ulster, that the tenant-right was universally understood to apply equally to leaseholders and tenants at will. The surprise of the intelligent inquirer would, I venture to say, be at finding the contrary to be the fact.

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## CHAPTER II.

### EARLY EXISTENCE OF THE ULSTER TENANT-RIGHT.

WE have seen\* that in the first quarter of the present century by far the larger portion of the Ulster tenants held by lease. On the large estates the tenure was almost exclusively leasehold. If the tenant-right custom did not extend to leaseholds where then, we may ask, did it exist? In the name of wonder, how did it grow up? The 40s. freehold franchise is as old as the English Parliament. From the first moment of party struggle in the Anglo-Irish Parliament we may be sure that leases for lives were freely granted to the Ulster Protestants by the large land-owners. Did the custom grow up among the unenfranchised Catholics, who formed the mass of tenants-at-will, to the exclusion of the enfranchised Protestant leaseholders? This is

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\* See *ante*, Book I., chap. iv.

incredible. Did it grow up on the small estates where leases were few, because their owners preferred their pecuniary interests to political importance, which indeed they could hardly expect to attain? This is historically false. The custom was least recognized on the small estates: on some of them it has been successfully resisted. It is logically impossible. A custom must have room withal in which to grow and extend itself. It is the result of general and long "use and wont" through the whole breadth of a district. It is general, not exceptional, practice and allowance which harden into custom. The Ulster tenant-right, if it had been planted in the interstices which the small estates formed between the great estates, must have withered away if it could not have extended its branches in the free air and large space which the latter afforded. It is impossible to account for its existence in the last century and its latter growth if it did not extend to the leased lands of the province.

But some sceptic may ask, was the tenant-right largely prevalent in Ulster in the 18th century? At the time of the Devon Commission hundreds of witnesses were examined, many of them old men whose memory reached back to the period of the American war: not one attempted to date the commencement of the custom: several of them spoke of it as existing as long back as they could remember. "In this district," said James Sinclair, Esq., J.P., of Holyhill, Strabane, "as long as I remember, and for a great length of time, as far back as the Plantation of Ulster, the tenant-right has been respected" (*Land Occup. Com.*, Vol i., p. 743). This highly respected gentleman, the owner of a large estate in Tyrone, which has been

always administered in the most liberal spirit of tenant-right was, as I learn from Burke's *Landed Gentry*, born in 1772.

Wakefield mentions two cases of the sale of the leasehold tenant-right, where large amounts were given. He says:—"On 14th August, 1809, the remainder of a lease of twelve acres at Ardress, near Moy, in county Armagh, rent 5s. 6d. per acre, depending on the life of a person 73 years of age, was sold for £160, without any building or local advantage to attach value to it. The lease of twelve acres belonging to Mr. Erson, rent 17s. per acre, depending on the life of a person 50 years of age, sold for £120" (*Account of Ireland*, Vol. ii., p. 147).

I sum up this chapter in the following propositions:—

1. *The Ulster tenant-right which the Land Act of 1870 first legalized, was undoubtedly prevalent in the last century.*
2. *Up to 1793 the leases were almost confined to the Protestant tenants; but after the Catholic Emancipation Act of 1793, estates generally, and the great estates particularly, were under lease.*
3. *If the tenant-right did not extend to these leased lands, then it must have grown up mainly among the Catholic tenants, and the tenants, Protestant and Catholic, of the small estates, a conclusion which is historically false and logically impossible.*



## CHAPTER III.

## THE LEASEHOLD TENANT-RIGHT IN THE TENANT-RIGHT BILLS.

HITHERTO my investigations into the facts of the custom have been in a rather remote time. I now come to recent days, when the legalization of tenant-right engaged the attention of public men.

It is a remarkable fact that the first Tenant-right Bill which was introduced into Parliament, the Bill of 1835, had for its exclusive object the protection of leaseholders on the termination of their lease. On its back were the names of two Ulster landowners, Mr. Sharman Crawford and Mr. M'Cance. It was only read a first time, and Mr. Crawford was even denied an opportunity of explaining its provisions. But in a speech which in the same session he delivered on Distress in county Mayo he refers to the dispossession of the 40s. freeholders without compensation, in order to consolidate farms up to the £10 standard, as the most grievous wrong in the relations of landlord and tenant. Like a practical man, as he was, Mr. Crawford began with a remedy for the injustice which attracted his attention in his own county, the denial of the tenant-right of leaseholders. He learned, however, that the yearly tenant in the south complained of the same thing as the leaseholder in the north, and the Bill was in 1836 re-introduced, but including yearly tenants in its scope; and as if to mark its applicability to the whole country, Mr. Sheil took the place of Mr. M'Cance, who had died in the interval, as sponsor for the Bill.

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ed alike the leaseholder on the expiration of his lease and the yearly tenant on the determination of his tenancy by notice to quit. It took precautions against the claim of tenants being defeated by the ordinary covenants for improvements in leases.

Mr. Sharman Crawford's Tenants' Bill of 1847, his Outgoing Tenants' Bill of 1848, his Tenant-right Bill of 1852, and the Tenant League Bill, each and all of them included leaseholders, making no distinction between them and yearly tenants in regard of the legalization of the custom.

The preamble of the Bill of 1848 recites that:—

"According to the tenant-right custom tenants claim a power to sell their right of possession to the premises, and such sales are made on the understanding that the incoming tenant shall be responsible to pay to the landlord the rent to which such premises are liable at the time of sale, or such change of rent as shall be afterwards settled from time to time by a fair valuation, which a solvent tenant might be reasonably expected to pay for the same, and it is further *the practice under this custom, in all cases of dispossession by the landlord, whether for non-payment of rent or other cause, or whether the premises be held by lease, or at will, or from year to year, that the tenant is permitted to sell his interest in the occupation, with all the improvements made thereon, to a new tenant, or else receives from, or is allowed by his landlord, the market price for the same, estimated as if sold to a solvent tenant, the landlord being paid out of the proceeds of such sale all rent or arrears of rent which may be due to him.*"

The Bill of 1852, which was prepared and brought in by Mr. Sharman Crawford, Mr. Keogh, and Mr. M'Cullagh (Torrens), states, in its preamble, that:—

"Whereas a custom, known by the name of 'Tenant-Right,' has been established in the province of Ulster, and more particularly in those parts called the Ulster Plantation, according to which custom a *right of continued occupation* is enjoyed by the tenant in possession, subject to the payment of the rent to which

he is liable, or such change of rent as shall be afterwards settled from time to time by fair valuation, *with a right to sell his occupation* to any solvent tenant to whom the landlord shall not make reasonable objection, and that such tenant shall not be evicted by the landlord without being permitted to sell his interest, or else being paid by the landlord the value thereof, as if sold to a solvent tenant; and whereas, on the faith of this custom, *in districts* wherein it has been established, valuable improvements have been made, and repeated sales of property have taken place, and the present occupiers are now generally in possession by the purchase of former tenants' interests in the premises; *and in accordance with the said custom, increased rents have been assessed on, and paid by tenants in consequence of the increased productive power and letting value of lands created by the improved culture of the soil under the said custom;* and whereas by the demand and enforcement of excessive rents, through the means of an unrestrained power of eviction, tenants may be deprived of their just rights under the said custom, &c.

"Sec. 2 defines 'tenant' to include tenants und erleases as well as those holding at will, or from year to year.

"Sec. 3 enables 'the tenant,' in districts where the custom of tenant-right is practised, to 'claim under the said custom the amount which a solvent tenant would give for such interest when brought to sale, according to the practice of the said custom in the district.'"

So far then it is clear that the tenants' demand for recognition of the leasehold tenant-right was plainly put. In the Land Bill of 1870, a similar recognition, owing to the principle adopted of leaving the custom undefined, was impossible. But the question was raised in Parliament, and the House of Commons emphatically declared its opinion upon it.

In Committee on the Land Bill, 1870, Mr. M'Lagan moved the following amendment on clause 1 of the Bill:—

"At the end of the clause to add the words 'any holding in Ulster under a lease made after the passing of this Act, and granted for a term certain of not less than 31 years, shall thenceforth cease to be subject to the Ulster custom.'"

Mr. M'Lagan explained his proposal by an instance.

"Supposing a landlord, wishing to extinguish the tenant-right, would get the farm valued, and finding it let at 5s. an acre less than it was let to the tenant—'You may have a lease for 31 years, at 5s. an acre below the value, provided that at the end of the term the right be extinguished.' The effect of that would be to substitute an annuity for a lump sum."

The amendment, it will thus be seen, was based on the supposition that an existing lease did not bar the tenant-right. And it only proposed that a lease granted in consideration of purchase of the tenant-right by reduction of rent should extinguish the custom; yet Mr. Fortescue opposed the amendment, on the ground "*that it was notorious—there was complete evidence of it in the Report of the Poor Law Inspectors\*—that it was very common that a 31 years' lease should run along with the custom, and not extinguish it; but if the hon. gentleman meant that a 31 years' lease might contain a clause barring the custom, that was quite unnecessary*" (*Hansard*, Vol. cc., p. 1,028). The House agreed with Mr. Fortescue, rejecting Mr. M'Lagan's amendment by a large majority.

In the face of these facts, not to speak of the evidence before the Devon Commission, and Lord Clanricarde's Committee, and the Reports of the Poor Law Inspectors, extracts from which are given in the next two chapters, I am at a loss to account for the surprise which has been lately expressed by many people out of, and one or two persons in Ulster, at the leaseholders' claim for tenant-right. So far from the claim being novel or unwarranted, it was put plainly and expressly in every

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\* See *post*, pp. 71-73.

form which Sharman Crawford's Tenant-right Bill assumed from 1835 till 1858; and it came directly before Parliament in an amendment on the Land Bill of 1870. The propositions I have desired to demonstrate in this chapter are these:—

1. *The Ulster tenant in every Tenant-right Bill introduced into Parliament on his behalf, was expressly declared to be entitled to the benefit of the custom at the determination of his lease.*

2. *The question was brought directly before the House of Commons in Committee on the Land Bill.*

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## CHAPTER IV.

### THE OCCUPYING LESSEES' TENANT-RIGHT.

#### SEC. I.—*The Evidence in the Devon Commission Report.*

HITHERTO the evidence cited has been indirect. We now come to the Devon Commission; and to evidence directly pointed to the question of the existence of the tenant-right in leased lands. The amount of testimony to its existence in the four bulky volumes in which the information collected by that committee has been reproduced, is positively overwhelming. I am compelled to make a selection; and the principle of selection I have adopted is this, to adduce the evidence of landlords and agents—some of them by no means friendly to tenant-right—in preference to that of tenant-farmers and clergymen. In this chapter I confine the evidence to occupying lessees.

The evidence of Thomas Douglas Bateson, Esq., of Buncrana, co. Donegal, land agent, is—

“In the case of a tenant at the expiration of a lease not agreeing with the terms offered by the landlord for the renewal of the lease, is it usual to let that person sell the tenant-right?—Yes, I allow it, and in a case where the farms were consolidated I gave them five years’ purchase; they were perfectly satisfied.

“Is it the custom of the country to allow it in those cases?—Yes, *it is an indisputable right in the country, and I think it is their just right*”—(*Land Occup. Com. Rep.*, Vol. i., p. 721).

John Vandeleur Stewart, Esq., of Rockhill, Letterkenny, co. Donegal, landed proprietor, says:—

“Lease or no lease makes no difference, because *the tenant-right is considered as the title*”—(*Ibid.*, p. 748).

Arthur Gamble Lewis, agent to the estates of Lord Rossmore, in co. Monaghan, says:—

“So far from disturbing people, it has been the habit to continue them in their holdings when the lease expired, so that *a man would get in a manner the same value for his holding upon the expiration of his lease, as if he had a good lease*”—Vol. iii., p. 932).

H. Atkinson, Esq., landholder, barony of Upper Iveagh, co. Down, says:—

“How far do you think the tenant-right affected by the tenure?—*I do not think it is at all affected by it. I think they give as much for it with a lease as without it, as they are never put out or disturbed so long as they pay the rent*”—(*Ibid.*, Vol. i., p. 403).

The following extract is from the evidence of W. Sharman Crawford, Esq.:—

“Does what is called the tenant-right prevail upon your property?—Yes, to a very large extent. By the tenant-right I mean the selling by the occupier of his right of occupation.

“Does it sell for a large amount upon your estate?—Yes, it does; I have reason to know it has sold for from £20 to £30 per acre.

“The rent of the acre being how much?—£1 or £1 5s.

“In the instances to which you allude, can you state whether the parties were tenants from year to year or lessees?—In some cases

they were lessees, in some cases tenants upon leases shortly to expire, and in some cases tenants at will"—(*Ibid.*, p. 197).

Robert Smith, Esq., Clerk of the Peace for the co. of Monaghan, says:—

"They very often sell the tenant-right where there is an old lease"—(*Ibid.*, p. 148).

Maurice Wilson Knox, Esq., of Rosemount, in the barony of Oneilland West, co. of Armagh, landed proprietor, gives the following evidence:—

"Is the tenant-right affected by the mode of tenure, whether by lease or at will?—Oh, if by lease certainly more is obtained.

"Do I understand that at the expiration of a lease a tenant may be outbid for his farm by a new tenant, and receive no payment in the shape of tenant-right from the incoming tenant?—I never knew an instance of it"—(*Ibid.*, p. 429).

Mr. Joshua Thomas Noble, assistant to Lord Charlemont's agent, speaking from intimate acquaintance with Lord Charlemont's property, comprising 33,000 acres in Tyrone and Armagh, extending from Newry to Lough Neagh, and with Miss Trench's property in Tyrone, comprising 12,000 or 13,000 acres, gives the following important evidence:—

"Is the tenant-right prevalent in the district?—Yes.

"Is it recognized by the landlord?—Yes.

"What is the value compared to a year's rent for the acre?—It varies from five to twenty years' purchase. I have known as much as twenty-three years' purchase.

"Did that depend upon tenure or what?—*It did not depend upon the tenure*; the tenure was upon an old life, and they could not well calculate upon more than two or three years' purchase"—(*Ibid.*, p. 442).

Edward Tickell, Esq., assistant barrister, co. Armagh, gives the following evidence:—

"Is there a tendency on the part of the head landlords in Armagh to raise their rents at the expiration of leases, in consequence of the large sums which the tenants have received?—Not, I believe, at all proportionate to the tenant-right.

"You do not consider generally that there is a feeling among the landlords that they could transfer the tenant-right into their pockets, as proprietors, by making a new lease?—I am almost confident that there is no such feeling existing in any class of the landlords"—(*Ibid.*, p. 52).

"Does the tenant-right extend in Armagh to lessees as well as tenants at will?—*It does, and the tenant-right is more valuable to the lessee in many instances.*

"Can you state whether the rate of purchase of the tenant-right differs much in cases of lessees from that of tenants at will?—I should think not much in ordinary cases of farms held under the great proprietors, and not held under very old leases. In a case which occurred before me two or three years ago, it was proved that the man had given upon the old taking £10 *an acre, for getting possession from the lessee with the assent of the landlord; in that case I believe the old lease had been evicted, and no new one had been actually executed; but the transaction being with the sanction of the landlord, his word was deemed equivalent to a lease.* . . . . . The difference between the rate of purchase of the tenant-right of the lessee and that of mere tenants at will, must of course depend a good deal upon the rent which was originally reserved, and the improvements which have subsequently taken place. For instance, upon Lord Charlemont's estate, where an old lease of land expires, there may be 20 acres of arable land where there were only one or two such acres at the commencement of it. The original rent, in cases of this description, was exceedingly small, and pending such a lease, more would be given for the tenant-right than would be given for a tenancy from year to year"—(*Ibid.*, p. 50).

John Hancock, Esq., J.P., agent of Lord Lurgan's estate of 25,000 acres in co. Armagh, says:—

"Here, through the intervention of the tenant-right, *although the lease may have expired, the tenant has still a large interest in his farm, and therefore, if he racks out his farm during the last years of the lease, he injures himself and not his landlord*"—(*Ibid.*, p. 482.)

Andrew Durham, Esq., landed proprietor, co. Down, says:—



"Leases are generally given for lives and years, say 21 years or 21 years and one life. Though the tenure is a short one, from confidence in his landlord, and the practice of acknowledging tenant-right, the tenant is not discouraged from outlay and improvements"—(*Ibid.*, p. 499).

John Waring Maxwell, Esq., of Finnebrogue, co. Down, says:—

"A farm of 21 acres, the years in the lease having expired, but one life in being, at a very advanced age, the tenant-right was sold for £500; lease considered of no value"—(*Ibid.*, p. 516).

John M'Carten, Esq., agent to Dean Waring's estates, co. Down, says:—

"What is the general rate at which the tenant-right is purchased from a tenant having a lease?—I have known it more than twenty-five years' purchase; in fact, in buying a lease, they buy the interest in the lease, and they buy the tenant-right besides. It is not buying the actual thing on the face of the lease, but they look at the tenant-right in addition. They would say, 'This lease is worth £100, the tenant-right is worth another £100; I will give £200 for it, if the tenant-right is acknowledged'"—(*Ibid.*, p. 464).

John Andrews, Esq., agent of Lord Londonderry's estates in co. Down, gives the following evidence:—

"Do you observe any difference in the condition of those who have and those who have not leases?—Not a bit; the one has just as much confidence as the other . . . *the tenant-right will sell for £10 an acre with or without a lease.*

"Is there much difference?—Very little, I would say almost none. I do not think it makes very much difference in the sale of our tenant-right, whether there is a lease or not"—(*Ibid.*, pp. 545-6).

David Cather, Esq., of Newtownlimavady, co. Derry, says:—

"There has not been so much demand for land lately. There was formerly such a demand for farms that I have known lands sold when the lease was nearly out, as *high as if there was a long lease*"—(*Ibid.*, p. 716).

A. Spotswood, Esq., agent to extensive estates in co. Derry, speaking of the Magherafelt estate, says:—

“Though the leases are so very nearly expired, there is no difference made in the value of the property, whether it is leased or not”—(*Ibid.*, p. 669).

Rowley Miller, Esq., agent to the Drapers’ Company, co. Derry, says:—

“Tenure does not affect the sale of the tenant-right here, one way or the other”—(*Ibid.*, p. 661).

Arthur Sampson, Esq., agent to the Fishmongers’ Company’s estate, co. Derry, says:—

“A person disposing of his tenant-right without a lease sells it as high as the man who has a lease”—(*Ibid.*, p. 729).

Sir James Stewart, Bart., of Rathmelton, co. Donegal, landed proprietor, says:—

“Is the value of the tenant-right affected by the tenure?—With respect to my own estate, they do not care for the tenure”—(*Ibid.*, p. 735).

James Sinclair, Esq., of Hollyhill, Strabane, co. Tyrone, landed proprietor, mentioned the case of a tenant, Philip Cullin, who purchased the interest in a lease dependent on the death of King William IV., shortly before that monarch’s death, and aware that the landlord, Mr. Batt, had determined not to renew it. Mr. Batt sent £100 to his agent to compensate Cullin, who was evicted when the lease came to an end. Cullin complained of not being allowed to sell. Mr. Sinclair was asked, “How far do you think that the value of the tenant-right is affected by the tenure?” The reply is—“I think not the least”—(*Ibid.*, p. 744).

John Forsythe, Esq., agent to estates in co. Antrim, says:—

“The value of the tenant-right is not affected by the tenure whether at will or not”—(*Ibid.*, p. 523).

Col. William Blacker, landed proprietor, co. Armagh, says:—

“The people drain because they find it an improvement to their grounds, and it pays itself; they find it so. Generally speaking, I would as soon think of paying a man for his coat or his shoes, or for anything else, seeing that it is for his own advantage he is doing everything.

“Supposing the man to have a lease?—Yes.

“By the duration of which he would be repaid for what he lays out on it?—Yes. . . .

“For one farm on my own property, near my own house, of five acres, I knew £100 given without a lease. I gave the man a lease, and he is now about to sell, and there is a competition among those who would give £100 for it again”—(*Ibid.*, p. 457).

William Blacker, Esq., agent to Lord Gosford and Col. Close, co. Armagh, says:—

“The tenants have no fear as to the improvements being taken advantage of by the landlords. I can give you an instance. At the expiration of a lease upon Lord Gosford’s estate, the original lessee had granted out piecemeal the holding he had originally occupied to different cottiers whom he had taken in, and he retained but a small holding of 2 or 3 acres. *At the expiration of the lease,* and when the surveyor was upon the road going to new value it, the cottiers clubbed together, and *paid the original lessee £16 an acre* for his 2 or 3 acres, to get him out of the place; that was the time the lease had expired.

“They were afraid to be put under the middleman again?—No, but they wanted to get an addition to their own farms, and to get him out”\*—(*Ibid.*, 325).

Rev. R. Gray, of Burt, co. Donegal, thus complains of an infringement of the custom:—

“The tenant-right was always prevalent on this estate until Mr. Kennedy (the agent), interfered with it in several cases.

“What was the nature of the interference?—I know cases where tenants at will were not permitted to sell their tenant-right; and

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\* See *post*, chapter v.

also a case where a party had paid a large sum for a lease, *upon the expiration of that lease was refused permission to sell his tenant-right*; while one of the tenants who got a portion of that same holding was allowed to sell it, and got £130 for it. In our part the feeling is that a man, whether he has a lease or not, has a right, or should be allowed to sell his interest in the land. Under a kind landlord, the tenant-right, where there is no lease, will sell in general for as much as where there is a lease"—(*Ibid.*, p. 689).

It is right to state that Isaac Colhoun, Esq., the solicitor and agent for the Templemore estate denied the accuracy of these charges, and stated that Mr. Kennedy and himself had always permitted the tenant to sell, unless there had been some bad conduct on his part; but *in no case was a tenant removed without making him full recompense*—(*Ibid.*, pp. 738-741).

Andrew Spotswood, Esq., agent for the Ballaghy, Castledawson, and other estates in co. Londonderry, says:—

"The tenants do not seem anxious about leases; and as a proof of it, the tenant-right will sell as high as a farm held on lease, and on the Magherafelt estate it does not make any difference, they have such confidence in their landlords.

"Their improvements will not be charged to them in the shape of increased rent when the lease falls?—Yes, that has always been the case"—(*Ibid.*, pp. 666-7).

Edward Golding, Esq., J.P., agent to Lord Blayney's property in co. Monaghan, says:—

"The sum given for the tenant-right does not in any instance, except where the farm is held by lease very much under the value, depend upon the tenure; *a farm recently let on lease or held at will being looked upon as the same*"—(*Ibid.*, p. 888).

The following extract is from the evidence of Mr. James White, farmer and flour miller, Bangor, co. Down:—

"Has there been any attempt in the district to abolish the tenant-right?—There has.

“With what consequences has that been attended?—The way it was done was—a gentleman in the neighbourhood bought an extensive estate in the parish of Bangor. The tenant-right was formerly recognized, and *when a farm was out of lease, it would sell for £10 an acre*; in many cases they were not able to pay the rent; it was sold, and the agent would then get so much of this as would pay off the arrears, and the rest was handed to the tenant going out. Now that gentleman says, he will not acknowledge the tenant-right in future; he will merely pay them for any permanent improvements they may make. The change has not come into operation yet. The tenants did not feel at all satisfied, for the greater number of those had made improvements on the land, or they had purchased the tenant-right, and gave £10 an acre” —(*Ibid.*, p. 580).

Nothing more clearly evidences the existence of the leasehold tenant-right than the transaction of “fining down the rent,” which took place on the Marquis of Hertford’s estate. Elaborate care was taken that for the fine paid on taking the lease of three lives (the only lease the then Marquis could grant), the yearly tenant should receive an exact equivalent. An actuary was employed to calculate what reduction of rent should be made for every £100 fine paid, allowing the tenant 6 per cent. for his money. The actuary’s calculation was £6 6s. The 6s. would insure the three lives for £100. “Lord Hertford, finding that would not satisfy the tenants, desired they should have £6 10s.” But there was no valuation of the tenant-right, because the acceptance of the lease had no effect upon it. This is fully explained in the evidence of Dean Stannus. He proceeds—

“In cases of granting leases, one-fourth of the rent is fined down. Tenants from year to year having got permission to sell, they bring forward the arrears and the fine for one-fourth of the fixed rent before getting a lease. This arrangement commenced in 1823. An effect of this system has been that where a tenant would have sold his tenant-right of a farm held at 20s. an acre, for £10 an acre, he will now sell it for about £12 or £13, allowing the fine

to come out of it, by which the purchaser holds at 15s. instead of 20s., having a very good lease"—(*Ibid.*, p. 495).

Mr. Nelson Bullock, of Fir Lodge, co. Antrim, farmer on the Hertford estate, says:—

"What is the custom of the property with reference to purchasing a place out of lease?—There is very little difference. A similar fine must be paid, and the person take out a lease.

"Has a person purchasing a lease, besides having to pay a fine to the landlord, also to pay what is called the purchase of the tenant-right?—Oh, certainly"—(*Ibid.*, p. 475).

## SEC. II.—*The Recent Evidence.* .

In this chapter, my extracts are from the later evidence given before the passing of the Land Act. I begin with the Committees of 1865 and 1867. The only witness from Ulster examined before Mr. Maguire's Committee in 1865 was Lord Dufferin—a witness, who was not then favourable to the custom, in this differing from nearly every landlord and agent in the province. Yet he tells the Committee that the "tenant-right of a farm without a lease would be sold for as high a price as the tenant-right of a farm with a lease"—(*Evidence on Tenure [Ireland] Bill*, 1865, p. 76).

William Steuart Trench, Esq., agent to large estates in the counties of Monaghan, Kerry, King's County, and the Queen's County, says:—

"Tenant-right, I might say to the full extent of the northern system, has been always permitted upon Lord Lansdowne's estate in the co. Kerry. A written contract with a tenant of land let from year to year would not necessarily be inconsistent with the practice of tenant-right. On Lord Lansdowne's estates, *written contracts have existed for the last ten years, and it has not altered the position, with regard to tenant-right, in the least degree*"—(*Minutes of Evidence on Tenure [Ireland] Bill*, 1867, p. 8, 16).

Fitzherbert Filgate, Esq., agent to the Marquis of Downshire, says:—

"*The existence of a lease makes no difference in the custom of tenant-right.* You give a lease for 21 years, and in 18 or 19 years, under the tenant-right system, the lease would sell for nearly as much as it would the first day.

"Does much improvement take place under the system?—A vast improvement.

"Has it been going on of late?—It has been going on steadily.

"Does the tenant-right custom much affect the rent?—No, not the fair letting value.

"Do you think that the tenant-right of Ulster is injurious to the landlord's interest?—I do not think it is"—(*Ibid.*, p. 187).

Robert Russell, Esq., agent to the Marquis of Conyngham's estates in the county Donegal, and to estates in the county Meath, says:—

"Tenant-right has prevailed in the county Donegal all the time I have known it [*i.e.*, forty years], and for many years before.

"I think *they would not consider a written contract to affect their tenant-right.*

"Would it not, in reality, affect their tenant-right?—No, I think not.

"So far as the north of Ireland is concerned it is quite immaterial for the interest of the landlord whether the law of distress be abolished or not, because *the tenant-right is a protection to the landlord*"—(*Ibid.*, pp. 93, 94, 97).

Mr. Trench, Mr. Filgate, and Mr. Russell were the only Ulster witnesses examined before Lord Clanricarde's Committee; but gentlemen more competent in point of experience to give evidence on the custom of tenant-right, or whose testimony should have greater weight with the landlords, it would be difficult to find. Mr. Russell was examined before the Devon Commission; and it is worth noting that his experience in the interval appears to have led him to a much more cordial appreciation of the custom in 1867 than in 1844.

I now come to the Poor Law Inspectors' Reports of 1869. Dr. Knox styles his district "the heart of the

tenant-right country." It comprised the county of Antrim, and parts of the counties of Armagh, Down, Londonderry, and Tyrone. Mr. R. Hamilton's district comprised the county of Donegal, parts of the counties of Cavan, Fermanagh, Leitrim, Londonderry, Monaghan, and Tyrone. Mr. O'Brien's district comprised parts of the counties of Armagh, Cavan, Down, Fermanagh, Monaghan, and Tyrone. They were requested by the Poor Law Commissioners to make inquiries of the guardians, *ex-officio* and elected, respecting the then existing relations of landlord and tenant in Ireland. One of the queries they were asked to report upon was, "Whether the Ulster custom was confined to tenants at will, or extended to lease-holding tenants;" and their replies are as follows:—

Dr. Knox says,

"The tenant-right is general, extending both to tenants at will and leaseholders. The purchaser considers that he is buying more than the remainder interest in the lease, viz., a claim for continued occupancy after it has expired"—(*Poor Law Inspectors' Reports on the existing Relations of Landlord and Tenant in Ireland*, p. 142).

Mr. O'Brien says,

"Where the custom prevails, it is as a general rule allowed to apply equally to leaseholders and tenants at will"—(*Ibid.*, p. 102).

Mr. R. Hamilton says,

"The custom is not confined to tenants at will, but extends to leaseholders, who expect to be paid for their good will on surrendering their holdings at the termination of the leases"—(*Ibid.*, p. 12).

I close this chapter with evidence which, if it stood alone, would be conclusive—the evidence of a nobleman whose estate is a model of enlightened management, and on which the Ulster tenant-right custom has prevailed with admittedly equal advantage to landlord and tenant.



This evidence was voluntarily tendered, when, on a recent occasion, unfair advantage was taken by Lord Lifford of his recent motion in the House of Lords for a select committee on the Land Act, to prejudice a case *sub judice* by statements contradictory of the leasehold tenant-right. Lord Lurgan on this occasion said:—

“He felt bound to state his belief, and what he knew to be the belief of a large body of the manly and upright tenantry of Ulster, that *the expiration of a lease did not do away with the Ulster custom of tenant-right*. That he thought to be a wise arrangement, for the tenant, instead of exhausting his farm, as he might do if he knew that he had no security for compensation on leaving it, would endeavour to keep his farm in a state of improvement and good cultivation”—(Speech in House of Lords on Lord Lifford’s motion 3rd June, 1872; 6 *Ir. Law Times*, p. 306).

All the recent evidence, which was before Parliament when legislating on the Ulster tenant-right, was on one side. *The Ulster agents examined before Lord Clanricarde’s Committee, and the Poor Law Inspectors, one and all, however they may have differed on other matters, were agreed on this, that the Ulster tenant-right attached to leased lands.*

## CHAPTER V.

### THE MIDDLEMAN TENANT-RIGHT.

AT the termination of a lease, the lessee might be non-resident, and the leased land in the occupation of sub-tenants. How did the custom deal with cases of this sort? The answer establishes the existence of the tenant-right in leased lands; but as the question is peculiar, I have reserved its consideration for a separate chapter.

The evidence which follows plainly establishes the

fact that the occupying tenant—middleman or sub-tenant—was entitled to the tenant-right of the portion he actually occupied. If all the leased land was in the hands of sub-tenants, they were taken into immediate connexion with the head landlord, and put on equal terms with his other tenants. Frequently, and especially after 1825, the landlord thought the subdivision had been excessive; and it became necessary that some of the under-tenants should be removed. In this case the outgoing tenants received from the tenants who took their holdings the value of their tenant-right.

Any other course of dealing would have been inequitable. The landlords had, as we have seen (*ante*, p. 24), encouraged sub-division on their estates. Their leases did not forbid it; or if they did, the clause was not enforced. The sub-tenants, therefore, came into occupation with the acquiescence of the head landlord; they built houses and reclaimed the land on the faith of the custom prevalent in the district; they bought and sold the tenant-right in their occupation; and no one forbade the practice. Why should they be punished for the faults of others? The Ulster landlord felt this; they were “in by the custom,” and he respected their tenant-right. He punished the non-resident middleman by transferring his tenant-right to the occupying tenants. Besides, the middleman was considered to have been fairly compensated by the profit rent he enjoyed during the existence of the lease.

The evidence is principally from the Devon Commission. The question was not at any other time made the subject of specific inquiry.

John Pearce Hamilton, J.P., agent to Lord Erne and other proprietors, co. Fermanagh, says:—

"Where we have consolidated farms of people who went out we have intimated our wish for them to sell. We generally found those people on farms *where the lease had expired*, and they were before that in the character of under-tenants of a middleman. They were aware that they would not all be retained, and our practice was that we gave them to understand *we would permit them to sell*"—(*Ibid.*, Vol. ii., p. 131).

John Edward Taylor, Esq., J.P., agent to Sir Arthur Brooke's estate, comprising 27,000 acres in co. Fermanagh, says:—

"In the case of new lettings, which is generally done as to the sub-tenants?—The tenants in occupation are generally recognized by the proprietor"—(*Ibid.*, p. 143).

G. W. Braddell, Esq., agent of Mr. Batt's estate, containing 10,000 acres in co. Down, says:—

"When the lease of a middleman falls in, do you treat the occupiers as tenants?—Yes; we never put out anybody without a remuneration"—(*Ibid.*, Vol. i., p. 417).

William C. Kyle, Esq., Secretary to the Commissioners of Education in Ireland, says:—

"Upon letting the lands to the occupying tenant *at the expiration of leases*, have the Board occasion to lessen the number, or are they able to locate all of them upon the lands?—They sometimes have occasion to get rid of some few, but they find it very difficult to *purchase them out*.

"On what property has that occurred?—On the Dungannon estate. They get rid of some of them, but very few.

"Was that by giving them compensation or by ejectment?—By compensation"—(*Land Occup. Com.*, Vol. i., p. 81).

John Hancock, Esq., J.P., Lord Lurgan's agent, says:—

"I take all parties residing on a farm at the expiration of a lease as tenants, direct to the proprietor, thus *depriving all middlemen of their chance of tenant-right*"—(*Ibid.*, p. 486).

Henry L. Prentice, Esq., Lord Caledon's agent, says:—

"When a lease expires, and a number of tenants have held under

a middleman, are the sub-tenants received as direct tenants?—Some of the best of them are selected, and farms made of a tolerable size. *The rest usually get some compensation from the head landlord on removing*”—(*Ibid.*, p. 841).

Mr. Alex. Pringle, farmer, says:—

“We generally expect under Lord Caledon that we would get a *renewal, or that we would get liberty to sell, if our lease was expired.*

“Does it make much difference whether a man has a lease or not?—Certainly it is very pleasant to have a lease. But I have known cases of land selling as high on this estate if they had not a lease. But I would certainly prefer a lease; I say in some instances, if the rent was not too high”—(*Ibid.*, p. 844).

Mr. John Wilkin, farmer, residing near Caledon, co. Tyrone:—

“If you want to leave the land, you may *sell the tenant-right even if the lease is expired*”—(*Ibid.*, p. 845).

Isaac Colhoun, Esq., land and law agent of Lord Templemore, co. Donegal, says:—

“The two properties of the late Lord Templemore were leased, the Burt property to the Howard family, and the Irish property to a Mr. Sweeteborn. The island of Inch was cut up into small proportions. The lease expired, I think, in 1831. The object of Mr. Kennedy and myself was to increase the farms; and whenever an opportunity offered by a *tenant wishing to sell, he was always without exception—unless when there was some bad conduct on his part—allowed that privilege, but with this restriction that it should be either to the adjoining tenant so as to enlarge his farm, or to some tenant upon the estate. This is the course I have always pursued up to the present moment*”—(*Ibid.*, p. 738).

James Johnston, Esq., of Stranorlar, co. Donegal, landed proprietor, says:—

“In Glenfin, the sub-tenants were the occupiers of the soil, previous to the expiration of the lease, and immediately before the lease dropped, the person who had the lease ejected them: the proprietor, considering they had a right to the occupation of the soil, put them back again; the object of the middleman was that he should be the tenant in possession, and the proprietor treated him as the tenant of what he was in actual possession of, but he

treated the sub-tenants as the occupiers of the parts which they had respectively held.

"What has been the effect of that proceeding?—It has certainly been to promote quietness in the district, and certainly beneficial to the proprietor"—(*Ibid.*, p. 793).

Mr. Alexander Murdoch, sub-agent to the Forkhill estate, co. Armagh, says:—

"Some few leases have expired on the estate. It was underlet by the lessee.

"How was it dealt with?—All let to the occupying tenants. The agent and I and two more men, farmers in the place, valued it. The rents were, some more and some less, than had been paid to the middleman"—(*Ibid.*, p. 871).

Charles H. Kennedy, Esq., said:—

"I considered what is called the *tenant-right as belonging to the occupying tenants and not to the middle landlord*, except for that portion of the arable lands which he held in his own hands"—(*Ibid.*, p. 988).

John Forsythe, Esq., agent to estates in co. Antrim, says:—

"Have you had any cases of leases falling out where there was a large number of under-tenants, and how were they treated?—With the exception of three or four cases, I have never known any of them removed; in these cases which have come within my knowledge within the last year or two, they could not possibly be retained.

"What course was taken to remove the tenants?—Just saying, 'there is so much money for you, and we are sorry we cannot let you remain.' *I paid them till they were satisfied.* The landlord paid them largely for what was scarcely worth anything"—(*Ibid.*, p. 524).

Capt. Wm. Sam. Hill, J.P., agent to the Earl of Roden, says:—

"Has much of the estate fallen out of lease?—Three whole townlands, and we have dispossessed no tenants. Upon one townland an old lease expired 10 or 12 years ago, and Lord Roden had the land let to the occupying under-tenants, 27 in number, who remained on it"—(*Ibid.*, p. 571).

Thomas Murray, Esq., agent to Marquis of Downshire, says:—

“When the old leases drop out they are given to the occupying tenant”—(*Ibid.*, p. 590).

Edward Oseland, Esq., agent to the Ironmongers' Company, co. Derry, says:—

“On the expiration of the middleman's lease for 60 years and three lives we took the occupying tenants. We received every under-tenant as an occupier”—(*Ibid.*, p. 647).

C. J. Knox, Esq., agent to the Clothworkers' Company, co. Derry, states that

“In January, 1840, Mr. Alexander's lease for 61 years or three lives expired. The Company took the rents as they found them, and continued the under-tenants, except that latterly they made a few reductions”—(*Ibid.*, p. 652).

Since the Land Act, the middleman tenant-right came under the judicial cognizance of James C. Coffey, Esq., Q.C., the Chairman of Londonderry. An old lease for lives and years of part of the estate of Miss Nesbitt, near Portglenone, which had become vested in Mrs. Lytle, had dropped. There were upwards of 20 sub-tenants on the estate, holding from year to year under Mrs. Lytle. Miss Nesbitt brought her ejectment; and Mrs. Lytle claimed the tenant-right against Miss Nesbitt; and the sub-tenants against Miss Nesbitt or Mrs. Lytle. Mrs. Lytle was non-resident. The sub-tenants had reclaimed the land, and made all the permanent improvements. Mr. Coffey, on the first hearing decided that, *as a matter of law*, the covenant in the lease to deliver up possession at the end of the term, barred the claim for tenant-right. On appeal, Chief Justice Monahan, at the summer assizes of Londonderry, 1871, reversed this decision; and remitted the case to the Chairman, to determine *as a matter*

of fact, whether the non-occupying middleman or the occupying sub-tenants were entitled to the tenant-right; and after hearing the evidence of Mr. Spotswood, land agent, Magherafelt, of Mr. Michael King, of Dungiven, land and law agent of several estates, a sub-agent of the Castledawson estate, and a number of other witnesses, who one and all deposed to the fact that the right of the occupying sub-tenants was alone recognized under the custom, a decree in their favour for £10 an acre, the admitted value of the tenant-right, was given by the Chairman against the head landlord. An appeal on behalf of Mrs. Lytle came before Mr. Justice Keogh, at the spring assizes, 1872, and was dismissed.

The sum of the evidence in this chapter is as follows:—

1. *On the determination of a non-occupying middleman's lease, the sub-tenants in occupation are received as tenants of the head landlord at fair customary rents.*

2. *This allowed them a tenant-right interest equal to that usually prevalent in the district.*

3. *If it was necessary to consolidate the holdings, the outgoing sub-tenants were permitted to sell their tenant-right to the continuing sub-tenants, or to receive from them the fair value thereof, as if so sold.*

4. *If the landlord, for the purpose of enlarging his demesne, ejected any of the sub-tenants, he paid therefor a fair tenant-right compensation.*

## CHAPTER VI.

## THE TENANT-RIGHT SYSTEM OF VALUATION FOR RENT.

IN the system of valuation for rent which was in use on many of the large tenant-right estates in Ulster, we find another proof of the leasehold tenant-right. Rents in Ulster have never been fixed by competition—by setting up the land to auction, or even by private proposals. Such a system could not co-exist with a tenant-right, an essential condition of which is a fairly-valued rent. The rent may be raised so as to encroach upon or even to extinguish it. The amount of the tenant-right payment is determined by the value of the holding, including the permanent improvements and good-will, over and above the rent paid to the landlord. Accordingly, the Ulster tenant-right landlord valued his estate, for revision of rents, at intervals generally of 20 or 30 years, corresponding with the usual term of years in leases. The valuation was general over the estate. It usually included the land still under lease, as well as that held by yearly tenants, and when the lease dropped, the tenant continued in occupation at the fairly-valued rent fixed at the general valuation of the estate, getting a new lease or continuing as yearly tenant. On the smaller estates, and especially of later years among the Landed Estates' Court purchasers, it was no doubt very usual for the landlord to value separately each leased holding, when the lease dropped—taking a small advantage which the large landowner disregarded, of those self-compensating improvements, incorporated with and indistinguishable from the soil, which the tenant made up to the termination of his



lease. But, even in these cases, the valuation was made on the principle of leaving the tenant the usual tenant-right interest of a yearly tenant, for which he could get the 10 or 20 years' purchase prevalent on the estate. But no landlord in Ulster ever proposed, on the dropping of a lease, either to raise the rent so as to extinguish the tenant-right, or to turn out the tenant without allowing him the right of sale or a fair tenant-right compensation. To do so would have been accounted as unwarrantable a violation of the custom as to do the same things in the case of a yearly tenancy which had been determined by notice to quit or ejectionment.

The system of valuation of a tenant-right estate was described by several witnesses examined before the Devon Commission. One of the most intelligent of their number, a gentleman whose evidence, carefully considered and admirably expressed, is by far the best account of the tenant-right custom to be found in those massive volumes, John Hancock, Esq., at the present time, as he was then, the agent of Lord Lurgan's extensive estates, thus describes the system of valuation for rent:—

“The rent is fixed by private contract founded on a valuation, and rarely by proposals. The persons usually employed to value land are land surveyors. *On the expiration of an old lease* in the valuation of a farm for new letting, it is valued according to the supposed fair value of the ground, without reference to the buildings. An attempt on the part of the landlords to convert the value which the property bears in the shape of tenant-right into increased rent would certainly be regarded by the tenant as an invasion of tenant-right”—(*Land Occup. Com. Rep.*, Vol. i., p. 483).

John Humphreys, Esq., the Marquis of Abercorn's agent, described the manner in which the Abercorn estate had been valued:—

"The rents were fixed by two experienced valuers in 1835; they were sent separately to their work, and not permitted to have any intercourse with each other until each had returned his valuation to my office; their books were then compared by me, and where any striking difference appeared, they were both ordered to review the farm, and give a fresh detailed statement of their valuation; so that all differences were adjusted before the tenants were made acquainted with their rents. The farms were all valued at an acreable rent, and the valuers had express orders to make such reductions on all lands reclaimed within 5 years of the valuation as would fully repay the tenant for his outlay; and in no instance has the tenant been charged any rent for the house and offices of his farm"—(*Ibid.*, p. 780).

W. Blacker, Esq., Lord Gosford's agent, says on the same subject:—

"The practice upon Lord Gosford's estate is this:—it is left to the sworn valuator to put a fair rent upon the land, and there is no tender or anything else of the kind; that value is the rent the tenant has to pay. The direction to the surveyor is that he shall *allow a fair interest in the soil* to the tenant, so that at the time the rent is behind, by bringing an ejectment, the tenant should always get something for his interest in the lease, and have something to carry him away to another place, and any arrears upon the property shall be forthcoming from the purchase-money of the new tenant"—(*Ibid.*, p. 325).

The system of valuing the whole estate, leased lands included, at the same time, and on the same basis—a system which clearly demonstrates the identity of tenant-right interest possessed by leaseholder and yearly tenant, is well explained by Henry L. Prentice, Esq., from his own experience as agent of Lord Caledon's estate:—

"Lord Caledon's estate was all valued by Mr. Brassington in the year 1814. I have the valuation of each farm and each field in a large book, so that when a farm falls out of lease, I find in this book the rent it may be rated at, making certain reductions which were ordered by the late Lord Caledon, to bring it to a fair value,

to meet the times. His lordship struck one-fourth off \* the whole of the valuation, and afterwards one-tenth of the residue"—(*Ibid.*, p. 838).

Similarly, A. Spotswood, Esq., the agent, describes the valuation of the Magherafelt estates:—

"The estate was all surveyed and valued in 1826, since which period no advance has taken place. He also denied that advantage had ever been taken of a tenant's improvements at the falling in of a lease, tenants well knowing that the rent of the holding will remain the same as in the valuation of 1826"—(*Ibid.*, supplement, p. 2).

A general valuation of Lord Powerscourt's Benburb estate was made in the year 1837, by Mr. James M'Neish (see evidence of Capt. Cranfield, *ibid.*, p. 847). That valuation included the leased lands, and for a long period, as the leases fell out, the tenants were, as I am informed, continued in occupation at the rents settled by the valuation of 1837.

It appears from the Devon Commission that a similar valuation of Lord Castlestuart's estate, near Dungannon, was made in 1843-44 by Mr M'Neish and Mr. Andrew Wilson.

A very intelligent and experienced land valuator, Mr. William J. Robinson, of Omagh, co. Tyrone, says:

"There are two customs in Ulster of valuing leased lands. One is, should a landlord wish a general survey of his estate, he instructs the surveyor to not merely value those farms in which there is a tenancy at will or an expired lease, but also such farms as he anticipates (as in lease of lives), or is certain (as in a lease for years) will shortly thereafter expire, say 10 years or so. The other is, a survey is made, and the farm with all its improvements valued at the expiration of the leases, and rent put on accordingly. The

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\* This was done because the valuation was made in 1814, at the height of the war and depreciated currency prices. See *ante*, p. 25, 35; and Appendix B.

*former had been the more prevalent on the larger estates; but is gradually giving place to the latter, which is the universal custom on the smaller estates, such as those of Landed Estates' Court purchasers. The reason of this difference in the mode of valuation is that the proprietors of the larger estates did not wish to go into so minute a valuation—placing on rent on each perch of reclaimed land and every item of improvement—as the owners of the smaller estates. In the former, the tenant had the benefit of improvements made between the valuation and the dropping of the lease; in the latter, the landlord derived a benefit from every improvement valued up to the termination of the lease.*

“On the Beltrim estate of Major Cole Hamilton, on which a general survey was made 14 years ago, and on Mr. Hope's estate, in the same neighbourhood—both of which are administered on the best tenant-right principles by Col. Ellis, the system has been to continue the leaseholder when his lease dropped at the rent fixed at the time of the general survey.

“On the Ecclesville estate, near Fintona, there was a general survey about five years ago. Several leases have since lapsed; and at the expiration of each there is a new valuation. Should the tenant complain, he is usually allowed to employ a valuator, who meets the estate valuator, and they agree upon a fair rent. I think there could not be a better specimen of a fair equitable tenant-right estate than the Ecclesville one.

“In every case one prevailing and cardinal custom is known, and cannot possibly be disproved in my range, viz., that the tenant at the expiration of a lease continues to occupy either as a tenant from year to year, or under a new lease at a fair rent, or sells his tenant-right. There are certainly some exceptional cases, but they are very few”—(Communication to the author, May, 1872).

Mr. James Hamill, of Bushmills, a gentleman who has had very extensive experience as an estate valuator in the counties of Antrim and Donegal, says:—

“In my experience as valuator, when called on to value an estate, the whole is valued under one, leased and unleased”—(Communication to the author, 24th May, 1872).

A surveyor and valuator, of large experience in the counties of Down and Armagh, says:—

“When a general valuation is made of an estate, in most cases the custom has been to value the life leases, or those for a short-term of years along with the lands at will. The rent then fixed is the rent charged on the fall of the lease in cases where the lease expires a short time afterwards. The more general custom is to value each lease separately, as it drops. In very few cases are tenants disturbed at the fall of their leases, except in so far as a change in the rents is made; and even in this respect, some have been reduced when found too high. There have been also many estates where some of the tenants have surrendered their leases when they found the rents too high, and on their so doing, by a mutual arrangement, the landlords have reduced the rents to what was considered fair by their valuers”—(The communication of this intelligent gentleman, who, from his connexion as estate valuator, desires to withhold his name, is dated 25th May, 1872).

Mr. John Church, of Strabane, the exceedingly intelligent surveyor and valuator on the Abercorn estate, as to which he supplies no information, but whose experience of estate management in Tyrone, Donegal, and Londonderry, is very extensive, says:—

“On the tenant-right estates with which I can give specific information—I omit the estate with which I am officially connected, concerning which I do not feel it my duty to give any information—the leases are usually granted in batches, and contain the same term of years, or the same life or lives. Consequently a considerable tract of land falls out of lease simultaneously; and in these cases the custom is to omit the leased lands when a general valuation of the estate is made. The leased lands are valued together, when the life drops or the term expires; and it sometimes happens, particularly on the small estates and the Encumbered Estates’ Court purchases, that tenancies at will which might otherwise have escaped a valuation for years are valued along with the lands out of lease. But where the leases are few in number, especially if they are expected to expire shortly, or where they are of uncertain and varying duration, the leased lands are included in the general valuation. In any case, at the expiration of a lease, the lands under lease are valued on the same principle and basis as the lands

held by yearly tenants"—(Communication to the author, dated 3rd June, 1872).

Since the Land Act, in several cases which have come before the Chairman, the system of valuation for rent on tenant-right estates has been given in evidence. In the case of *Thompson v. Hamilton*,\* at the Land Sessions of Ballymena, Easter, 1872, Mr. Robert M'Cartney, a valuator of 20 years' experience, deposed that he had been employed by most of the landlords of North Antrim, and of the adjoining parts of co. Derry, including the Earl of Antrim, Sir E. MacNaghten, Lady Garvagh, Captain Macartney, John Cramsie, Esq., and others; and that in valuing for a revised rent, his principle was to fix the rent at such a figure that the tenant should be left a tenant-right interest of ten years' purchase—"When a tenant does not get 10 years' purchase, the rent is too high."

In the case of *Burns v. Earl of Ranfurley*,† at the Dungannon Land Sessions, Easter, 1872, Mr. Divers, who had been connected with the management of estates amounting to £30,000 a year rental, deposed that on those estates, the practice was to value the lands under lease and those held by yearly tenants at the same time and on the same principle, the leaseholder, when his lease dropped, being continued in occupation at the rent fixed at this general valuation; and that to eject him without compensation or allowing him to sell would be considered a violation of the custom.

The evidence in this chapter establishes the fact that,  
1. *Where the leased land was valued at the expiration*

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\* Reported in Appendix.

† Reported in Appendix.

or on surrender of the lease, it was on the principle of allowing the occupier the usual tenant-right interest of the estate.

2. Where the leased land was valued at a general valuation of the estate, simultaneously with the land held by yearly tenants, and at the same rate, for the rent to be paid when the lease should drop, a tenant-right even more valuable than that of the yearly tenant was conceded to the leaseholder.

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## CHAPTER VII.

### AGRARIAN OUTRAGE IN ULSTER.

THE general practice in Ulster of acknowledging the leasehold tenant-right has received ample illustration in the preceding chapters. The exceptions are, however, almost as instructive.

The almost total absence of agrarian outrage in Ulster has arrested the attention of social inquirers. It has been attributed, sometimes to race, sometimes to religion, by persons who have forgotten that considerably more than one-half the population of the province are Catholic Celts. Most of the land-agents of Ulster, who have been examined before Royal Commissions and Parliamentary Committees, have properly attributed the phenomenon to the existence of the tenant-right custom. The *Devon Digest* sums up the evidence in these words:—"In the northern counties the general recognition of the tenant-right has prevented the frequent occurrence of agrarian crimes. Even there, however, if the tenant-right be disregarded, and a tenant be evicted without having

received the price of his good-will, outrages are generally the consequence"—(Part I., p. 319.) John Andrews, Esq., of Comber, who was for some 40 years agent of the estates of the Marquis of Londonderry, in the co. of Down, stated before the Devon Commissioners:—

"A curtailment of tenant-right cannot be carried out without danger to the peace of the country. You would have a Tipperary in Down, if you attempted to carry it out."

"A Tipperary in Down" would be very objectionable, even in a pecuniary point of view. The statistics of Dr. W. Neilson Hancock put this in a very striking light. He says—

"Sums paid for 'goodwill,' by incoming tenants or landlords are wise and proper payments. They allow the consolidation of farms and necessary emigration to go on with peace and satisfaction; and hence in the co. of Londonderry, where they most prevail, notwithstanding as extensive an emigration and consolidation of farms as in other parts of Ireland, the police force now required is only 1 in 974 of the population; whilst in the North Riding of Tipperary, where the rights of outgoing tenants have been least attended to, the police number 1 in 202 of the population, besides a considerable difference in the proportion of military. As the military and Irish constabulary are both paid out of the general taxes, this is a matter of interest to other persons than landlords or tenants"\*—(*Report on the Landlord and Tenant Question in Ireland*, 1866).

\* Dr. Hancock exhibits the difference in the following table:—

POLICE IN NORTH RIDING OF TIPPERARY.

Police in North Riding of Tipperary	537
Police required if only in same proportion as in Londonderry	90
Excess of police in North Riding of Tipperary	447



Yet Ulster has not been altogether free from agrarian outrage. And it is somewhat startling to find that all the most serious disturbances have arisen out of the denial of the leasehold tenant-right—disturbances in which the sturdy Protestant yeomen of the Plantation took the principal part.

The Hearts of Steel insurrection, which commenced in the year 1769, had its origin in the denial by the Marquis of Donegall\* of the leasehold tenant-right on his estates in Antrim. The historian says:—

“An estate in the co. of Antrim, a part of the vast possessions of an absentee nobleman, the Marquis of Donegall, was proposed, when its leases had expired, to be set only to those who could pay large fines. Numbers of the former tenants, neither able to pay the fines, nor the rents demanded by those who on payment of fines and fees, took leases over them, were dispossessed of their tenements and left without means of subsistence. Rendered thus desperate, they maimed the cattle of those who had taken their lands, committed other outrages, and to express a firmness of resolution,

The cost of the excess of police is defrayed as follows:—

Tenants paying county cess for excess charged for	£3,881
The general tax-payers of the United Kingdom -	19,058
	<hr/>
Total estimated cost of excess	- - £22,939

MILITARY IN NORTH RIDING OF TIPPERARY.

Military in North Riding of Tipperary -	604
Military required if only in same proportion as in Londonderry	70
Excess of military in North Riding of Tip- perary	534
Estimated cost of excess -	- £49,128

Total cost of excess, military and police      £72,067

This was about 13s. 6d. for each head of the population; it was 11s. an acre on the land under crop.

\* The name in Madden's *United Irishmen* is Downshire.

styled themselves *Hearts of Steel*" (Gordon, *History of Ireland*, Dublin, 1804, Vol. ii., p. 247).

This treatment of Lord Donegall's tenants was in utter violation of the custom described in the preceding chapters. According to the custom, on the fall of the middlemen's leases, the occupying tenants were entitled to be continued in occupation at a fair customary rent, or if dispossessed, to be paid the fair value of their tenant-right by the landlord or the occupiers who took their place.

Lord Donegall's conduct found imitators in the adjoining counties. A sort of landlord combination was formed to do away with the tenant-right. The consequences were disastrous socially and politically. The insurrection spread. Houses were destroyed and flagrant acts of inhumanity committed. Some of the insurrectionists tried at Carrickfergus, were acquitted. An Act, 11 & 12 Geo. III., c. 5, entitled an "Act for punishing disorders in the Counties of Antrim, Down, Armagh, and City and County of Londonderry," was passed, the preamble of which states that the object of the disturbers was "to deter any person from letting or taking leases of land." The Act ordered persons indicted of outrages in those counties to be tried in different counties. In consequence, several of the Steel boys were tried in Dublin. "But so strong," says Crawford, "was the prejudice conceived against this breach of a fundamental law of the constitution that no jury there would find any of them guilty. Soon after the obnoxious Act was repealed" (*History of Ireland*, Strabane, 1783). Gordon proceeds—

"The insurrection was totally quelled, but its effects were long baneful. So great and wide was the discontent that many thousands

of Protestants emigrated from these parts of Ulster to the American settlements, where they soon appeared in arms against the British Government, and contributed powerfully, by their zeal and valour, to the separation of the American colonies from the empire of Great Britain" \*—(*History of Ireland*, Vol. ii., p. 248).

At a later period, and in the most peaceful districts, outrage followed the denial of the leasehold tenant-right. The murder in January 1841 of Mr. Powell, the agriculturist on Mr. Quin's estate in co. Armagh, for which two persons were hanged, arose out of an attempt on the part of Mr. Quin, on the expiration of an old lease of lands on which there were 50 subtenants, to violate the leasehold tenant-right, by taking up for a demesne a portion of the subtenants' holdings without purchasing them out. Mr. Quin's own account of his plan is given in his evidence before the Devon Commission. It was—

"To take a certain portion of the property into his own hands, subjecting every person in the land which fell out of lease to such changes in respect to the quantities of their farms, as he should be obliged to make, pledging himself most solemnly that none should be without a holding under him, that he was sorry to find so many under tenants on the property, but he felt that he could not with propriety dispossess them altogether, nor could he afford to purchase them out,† which was, he believed, a very common practice"—(*Land Occup. Com.*, Vol. i., p. 341).

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\* "Most of the early successes in America were immediately owing to the vigorous exertions and prowess of the Irish emigrants, chiefly from the north, who bore arms in that cause"—(Plowden, *Hist. Review*, i., p. 458). The pick of the Londonderry emigrants formed, it is said, the body-guard of Washington.

† The Rev. Mr. Lennon told the Commissioners that he had been informed by Mr. Quin's agent, that on the latter urging on Mr. Quin the propriety of giving compensation to the people before putting them away, the reply he got from him was he *did not see how he was called upon to purchase his own land*—(*Ibid.*, Vol. i., p. 368). Mr. Stringer,

In 1829, similar results followed a similar violation of tenant-right on the Hodson estate, near Bailieborough, in the county of Cavan. The estate, "from being the quietest, was a scene of misery and disturbance for years afterwards"—(Evidence of William O'Reilly, Esq., *Ibid.*, Vol. i., p. 389.)

Robert Holbeche Dolling, Esq., landed proprietor, speaking of the baronies of Lower and Upper Iveagh, county Down; of O'Neiland West, county Armagh; and of Upper Massereene, county Antrim—a district of 100,000 acres, stated—

"I am *only aware of two agrarian outrages* in this part of the country in the last eight or nine years; and those occurred in the cases of *middlemen who had disregarded the tenant-right*"—(*Ibid.*, p. 473).

Mr. Matthew W. Lowry, of Killinchy, county Down, detailed two cases of outrage which had in the previous winter occurred in that peaceable district, and he traced the cause to exceptional infringements of the leasehold tenant-right—(*Ibid.*, p. 541).

Mr. Philip Smith, agent and landowner in the county of Cavan, says—

"There have been some disturbances at some tenants being dispossessed. There were some burnings—two or three; and an attempt to shoot at the Rev. Marcus Beresford.

"Do you know whether they received any compensation, or were allowed to sell the tenant-right?—They were not allowed to sell

the agent, communicated to the Commissioners that Mr. Quin had made an arrangement that no tenant should give more than £5 per acre for the tenant-right, though it was selling at the same time on his estate at £10 to £12 per acre; and that this, coupled with an idea that Mr. Quin would take up the land he required for his own occupation, 100 to 150 acres, at the same rate, led to the outrages—(iv., p. 12-13).

the tenant-right; and two of them only got compensation"—(*Ibid.*, Vol. ii., p. 112).

Mr. Andrews's expression, "A Tipperary in Down," is well illustrated by Maurice Collis, Esq., who, as manager of the estates of Trinity College, was well acquainted with the land systems of north and south:—

"I think it will be found that it was rather a general habit to grant leases for lives or 31 years, between the years 1790 and 1800. I have heard that a great many *outrages were committed, owing to ejectments on the expiration of these leases.* When I was collecting my returns lately in Tipperary, one night in particular when I had 20 or 30 of the occupiers about me, I told them the very bad name their county had in every part of Ireland. The reply was that they would not be ground down by any landlord or agent, and that if in other places persons acted in the same way perhaps they might fare better. I asked about the plan adopted when leases fall in, or in cases of ejectment, emigration, &c.; the answer was No compensation or consideration. I stated the general system in the north; and when I related cases where the tenants were ejected for non-payment of rent, and that when the new tenant came in, he would not get the farm, nor in many cases would he take it, without purchasing the tenant's right, and any balance which remained after deducting the arrears was handed over to the former tenant, and unless the arrear was very great, he had generally to receive a handsome sum. They said *if such a system was adopted in Tipperary, there would be but few murders*; and if the same practice was in the north, amongst landlords and agents as in their county, they might be worse"—(*Ibid.*, Vol. i., p. 250).

A Presbyterian Minister in the county of Down was startled at finding the spirit of Tipperary suddenly aroused amongst his orderly and religious people when an attempt was made to deny the tenant-right:—

"An attempt was made to dispossess the owner, without allowing him to sell, which has been invariably the practice throughout our county, and we were greatly scandalized by it. In fact armies were brought in, and honest men were involved, and surprised at the violence and murderous dispositions manifested, when parties were

excited about it; for I ought to state, perhaps, that every particle of improvement, every stone upon my farm, and every slate, was put together by myself, and every drain was made, and every tree planted out of my own pocket, and I did it with great confidence, because when I purchased, I paid a very high value for what I got, and I considered that I was to have the same right to remuneration"—(Evidence of Rev. James Porter, *ibid.*, p. 399).

It is not to palliate, much less to justify, these deplorable outrages that the memory of the events recorded in this chapter is revived. But when labour has been expended and money has been paid on the faith of old and general custom, it well behoves the Legislature to consider whether the sanction of law should be withheld from such transactions, and whether if the sense of property, begotten in this the only way in which it has ever arisen, and which is as much to be cherished in the case of peasants as of peers, is violated, a shock is not given to the whole fabric of society, and a state of lawlessness induced for which the law is responsible. And I think a wise and far-sighted landlord would hesitate long, no matter how excellent he might deem his own scheme of estate-management, no matter how confident he might feel in the benevolence of his own intentions, before he would overturn a system handed down from old times, approved of and acted on through an immense district, if the result were to transfer to his own pocket a property which had theretofore been generally considered to belong to the tenant. Occasionally covetousness or caprice may have prompted such an act: more frequently it has been the rash experiment of a benevolent *doctrinaire*. But sure I am that nothing could be more dangerous in a country like this, if it were generally accepted by the landlords, than the truly revolutionary idea of repudiating the obligations,

while claiming the rights and benefits of hereditary acquisition. The law has hitherto paid far too little respect to custom in Ireland. There can be no law truly founded on the will of the people, where custom is disregarded. It is the pre-eminent merit of the Land Act that in its forefront has been placed a recognition of a beneficent custom—the safeguard not merely of inherited benefit, but the first-fruits of a just policy and the earnest of a better future.

## BOOK II.—ECONOMICAL.

## CHAPTER I.

## TENANT-RIGHT AT FORTY YEARS' PURCHASE.

THE *Digest of Evidence on the Occupation of Land in Ireland* sums up the evidence as to the price of the tenant-right as follows:—

“The price of tenant-right frequently amounts to £10, £12, £20, or £25 per acre, and sometimes as much as 40 years' purchase of the rent is paid for it”—(Part I., p. 290).

Thus, of the county of Donegal, Lord George Hill says—“The good-will or tenant-right of a farm is generally very high, often amounting to 40 or 50 years' purchase.” The *Times'* Commissioner of 1845, Mr. Campbell Foster, remarked in a letter dated from Dunfanaghy, county Donegal:—“Instances are common of the tenant-right being three times the value of the fee-simple of the land.” The amount of compensation awarded by the Land Court in the case of *Friel v. Lord Leitrim*,\* has made the Donegal tenant-right a subject of adverse criticism—with little reason, as it is not difficult to show. The reader will remark that when an instance is given of high tenant-right in Donegal, it is described by the number of years' rent, never by the value per acre. Thus, in the case mentioned by Mr. Campbell Foster, the tenant-right amounted to less than 10s. an acre. In Hugh Friel's case it amounted to about £6 an acre. Now no one wonders at a tenant-

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\* Reported in Appendix.



right of twice or thrice this amount per acre in Down or Armagh. The number of years' purchase of the rent is no criterion of the reasonableness of the tenant-right compensation. There are two elements in the tenant-right, payment for good-will and compensation for improvements. Now, the permanent improvements made by the tenant do not form an element of rent under the tenant-right, just as by the general legislation of the Land Act, a "fair rent" is defined as—

"A rent which does not take into account against the tenant the increase in the value of the holding arising from any improvements executed by him or his predecessors in title"—(Sec. 28).

Take the case of farm-buildings. A tenant, to receive compensation for these, must get a great many more years' rent in a backward district where rent is low, than in the neighbourhood of a town, where rent is high. The buildings on a 50-acre tillage farm in the heart of Tyrone or Donegal, will be as expensive as the buildings on a similar farm in the neighbourhood of Belfast or Dublin. Say the cost is in either case £300. The rent of the farm in Tyrone is perhaps dear at 10s. an acre; in the neighbourhood of Dublin, the same farm would be cheap at £5 an acre. The facility of communication by road, and the adjacency of the profitable and varied market which a large town affords, are worth the difference. In equity and in common sense, the Tyrone tenant and the Dublin tenant must receive the same lump sum as compensation for buildings which cost the same, viz., £300. This is 12 years' purchase of the rent for the Tyrone tenant; not quite  $1\frac{1}{2}$  years' purchase for the Dublin tenant. But according to the logic of Lord Leitrim, the Achilles of combative Irish landlordism,

and of his armour-bearer Lord Lifford, they should both receive the same number of years' purchase; and as it would be obviously unjust to give the Dublin tenant 12 years' purchase, or £3,000, the compensation must be equalized by reducing the Tyrone tenant's claim for buildings to  $1\frac{1}{2}$  years' purchase, or £30! In other words, £300 worth of houses is compensated by £3,000 or by £30, with equal fairness, according to the stand-point. £300 could never be £300 in the compensation arithmetic of the noble lords, for this would be 12 years' rent for the one,  $1\frac{1}{2}$  years' rent for the other—a flagrant instance of unequal administration of the Land Act in different counties!

I have supposed that the buildings on the two farms were exactly equal. As a matter of fact, there would be very little, if any difference. But the argument holds good, unless the value of the buildings were proportionate to the rent; that is, in the case put, unless the Tyrone farm only required buildings worth £30 for the £300 worth on the Dublin farm.

The argument applies still more strongly to other improvements. For, whereas the buildings on two farms of equal extent will differ little, the other improvements—reclamation for instance—may be any number of times greater in Donegal than in Dublin. A 50-acre farm of Lord Howth's say, is let fully reclaimed at £7 an acre; a 50-acre farm in the mountains of Donegal is let, a barren waste, at 1s. an acre. The tenant of the latter has made reclamations worth £2 an acre over the farm, for which on eviction he is entitled to £100. Lord Howth's tenant drains and fences to the amount of £100. Is injustice done—is the Land Act unfairly administered, because the Donegal tenant is declared

entitled to 40 years' rent, Lord Howth's Sutton tenant to barely a quarter's rent?

And this is the practical case. The tenant in the Highlands of Donegal builds his house and reclaims the heath. His labour gives value to the waste. Unless that value is, at the very moment of its creation, to be declared the property of the landlord, and to pass into rent, the rent can be no criterion of the reasonableness of compensation for improvements.

This argument holds good equally in the case of the 4th section of the Land Act and the improvement element of the Ulster tenant-right.

There is not the same economical objection to measuring by the year's rent the good-will element of the tenant-right—the compensation for disturbance of the Act. The compensation of the 3rd section is calculated on the rent according to an artificial scale which allows a greater number of year's rent to the low-valued than to the high-valued farm. And in the natural system of compensation which has grown up under the Ulster custom, the low-rented tenant of a mountain district realizes a vastly greater number of years' purchase of the rent than the high-rented tenant of the lowlands, because more is required to enable him to emigrate or move to a new field of industry.

From this argument it follows that—

1. *The number of years' rent can be no criterion of the reasonableness of compensation for improvements.*
2. *It can be no criterion of the value of the tenant-right.*

## CHAPTER II.

## RESTRICTIONS OF PRICES.

THE policy of restricting prices is of old date. It has been found, whenever it has been tried, not only inefficacious, but mischievous. What a grave writer on economical science calls "the infernal object" of the Statutes of Labourers was to keep down the rate of wages; in other words, the price of labour.

Adam Smith says:—

"Anciently it was usual to rate wages, first by general laws extending over the whole kingdom, and afterwards by particular orders of the Justices of Peace in every particular county. Both these practices have now gone entirely into disuse. In ancient times, too, it was usual to attempt to regulate the profit of merchants and other dealers, by rating the price both of provisions and other goods. The assize of bread is the only remnant of this ancient usage."—(*Wealth of Nations*, book i., c. 10.)

These regulations went into disuse, because they utterly failed in their object. Underhand payments were made, which could not be restrained. So far as they were not useless, they were mischievous, by interfering with the natural law of supply and demand.

Adam Smith quotes Dr. Burn, who says:—

"By the experience of about 400 years, it seems time to lay aside all endeavours to bring under strict regulations, what in its own nature seems incapable of minute limitation: for if all persons on the same kind of work were to receive equal wages, there would be no emulation, and no room left for industry or ingenuity."

The few Ulster landlords—for the investigations in the Land Courts show that they are very few, except in the county of Fermanagh, where it would appear they

are rather numerous—have been attempting to carry out an impossible policy, and one which the law now regards with disfavour. Evidence before the Devon Commission and Lord Clanricarde's Committee, as well as the Reports of the Poor Law Inspectors, show that these restrictions are constantly evaded by underhand arrangements. The principle on which restrictions on the price of labour were abandoned is particularly applicable to restrictions on the price of the tenant-right—the impolicy of bringing “under strict regulations *what in its own nature seems incapable of minute limitation.*” We have seen that the Ulster tenant-right has two elements—improvements and good-will. Whilst the Act treats, in the 3rd section, payment for good-will [*i.e.*, compensation for disturbance] as limited, it leaves unlimited compensation for improvements. Hence, it follows, that, on the principle of the Act, the tenant-right which is composed of those two should also be unlimited. Paraphrasing the language of Dr. Burn, quoted approvingly by Adam Smith, we may say, “If all tenants were to receive equal compensation for improvements [the same number of years' rent or the same amount per acre], there would be no emulation, and no room left for industry.”

If the tenant-right is to be limited to ten years' purchase of the rent, no one will make improvements beyond this amount. Where the rent is small, we have seen in the preceding chapter that this would have been an absolute bar to the making of all permanent improvement. But if, as is the case in North Antrim,\* the good-will element alone is worth ten years' purchase, then a restriction to

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\* See *ante*, p. 86.

this amount is an absolute discouragement of all improvement.

The same considerations apply to restrictions on the leasehold tenant-right. They have a special economic disadvantage, which was pointed out by Mr. Hancock (see *ante*, p. 64), that they discourage the improvement of the farm in the latter years of the lease; under the freehold lease without years, or with years after their expiration, they discourage improvements at all times.

If a leaseholder in Ulster has already an interest equal to the limit, why should he expend his labour and capital in further improvements, for which he will have no return? This short-sighted policy of certain landlords is as suicidal as it is selfish. The Ulster landlords have hitherto had their share, after a lapse of time, in the improvements which the tenants' industry and capital have created. Those improvements have been the direct result of the acknowledgment of an unrestricted tenant-right. They have transferred the most barren into the most fertile of the four provinces; and rents have increased in a proportionate degree. A system which for present greed, or love of arbitrary power, or the uninstructed desire of paternal government, would sacrifice the prospects of the future and the good of all, deserves no encouragement.

The system of restriction in price is, therefore, contrary to the policy of the law, to the principles of the Land Act, and to the general good of the community. A system which indirectly prohibits, and absolutely discourages improvement, should receive no favour in a court of law. I shall show hereafter that these restrictions are no part of the Ulster Custom, and have not received legalization in the first section of the Act.

## CHAPTER III.

## OBJECTIONS TO TENANT-RIGHT.

ONE of the commonest objections to tenant-right is that it is an abstraction from the value of the landlord's estate. If the landlord's estate sells for twenty, and the tenant-right for ten years' purchase, it is said the tenant-right has eaten up the half of the fee-simple. The fallacy is gross, but worth refuting. It lies in the assumption that the tenant-right is part of the landlord's estate. So far as improvements enter into the value of the tenant-right, they are an addition to, not a subtraction from the landlord's estate—unless, indeed, we are to accept as divine authority the maxim of the Roman law, mutilated\* to serve as a support for felonious landlordism—*Quidquid plantatur solo, solo cedit*, or, as Mr. Justice Shee translated it, "Tenants' improvements are landlords' perquisites." It proves how long-lived is error or how meagre is the invention of its supporters that this evident fallacy should survive in a time when, with the approval of every individual in the community, tenants'† improvements have been declared by law tenant property.

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\* The Roman law added that the maxim applied subject to compensation. "The owner who should dispute this right of compensation, and seek to retain the improvements without paying for them was deemed fraudulent and made subject to an action" (Finlason, *History of Land Tenures*, p. 31). Mr. Finlason adds—"When a distinguished statesman declared landlords felonious who robbed the tenants of the value of their improvements, he had high authority" (*Ibid.*, p. 4.)

† "If a man is a small farmer, he has, I may say, hardly an alternative. If he does not get the land, he has to choose between it, the poor-house, and America"—(Speech of A. Kavanagh, Esq., M.P., on Land Bill, 1870—Hansard, *Debates*, Vol. 199, p. 1408).

In the previous chapter I have shown that in logic and common justice, the compensation for improvements may amount to any number of years' purchase of the rent. This is so, because they are an addition to the property on which the rent was assessed. They do not diminish that property ; they only give it certainty and lend it security.

So far as the good-will element enters into the tenant-right, compensation therefor is no diminution of the landlord's estate. It is a payment in case of poor-rates, in the case of the smaller tenants, it has dispensed with the necessity for an emigration-rate ; it has kept down the police rate to the lowest imaginable point. All these changes, economic science views, and practical legislation treats as proper charges upon the land.

The economic peculiarities of land have attracted the attention of political economists, but not before they had arrested that of financiers in every country, and in every stage of civilization. No man made the land ; it is incapable of indefinite production. From the monopoly of land, economic science deduces the right of the legislature to depart from the general rule of *Laissez-faire*, and to stand between the landlord and tenant and limit their freedom of contract. From this monopoly has been deduced the obligation of the land specially to be taxed for the people upon it—for the support of the poor,\* for the payment of police, and for the general needs of the state.

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\* See Judge Longfield's *Lectures on the Poor Laws*, delivered by him as Professor of Political Economy in the University of Dublin, where he shows that a charge upon land for the support of the poor, is a necessary consequence of the recognition of private property in land.



In a previous chapter\* we have seen how efficaciously the Ulster tenant-right has worked to keep down police charges. The burden of supporting the Irish police was shifted from the land of Ireland to the general taxpayers of the kingdom ; but the argument is none the worse for this. It was done by Sir Robert Peel in 1846 to recompense the Irish landlords for the abolition of protection. As they have since raised their rents above what they were before 1846, the time may not be far off when some cunning Chancellor of the Exchequer may think it his duty to announce that the imaginary claim has been more than satisfied.

Its efficacy in diminishing poor-rates is equally striking. In recent years the expenditure in poor-rates has been more than double the amount in the pound in Munster which it has been in Ulster. That this result is not due to the manufactures of the northern province is shown by the fact that in the tenant-right county of Fermanagh, where there are no manufactures, the poor-rate is far below the average of Ulster.

It has been objected to the Ulster tenant-right that it enables an off-going tenant to leave the country, carrying the capital received for his good-will away with him.

\* See Book I., Chapter vii. In his "Argument in Support of the Right of the Poor in Ireland to a National Provision," published in 1768, Dr. Woodward, Dean of Clogher, and afterwards Bishop of Cloyne, who was well acquainted with the Ulster custom, mentions, amongst the causes of the poverty of the Irish cottagers, "the exorbitant rent extorted from them by the general method of letting farms to the highest bidder, *without any allowance to a tenant-right.*" In 1768 the cottager (or cottier), it thus appears, had no tenant-right, and therefore he required a poor-law. Amongst larger tenants, tenant-right would appear to have been conceded—for *exceptio probat regulam.*

Nothing can be more reasonable; nothing more desirable. An emigration-rate is a proper charge upon land. The Irish Poor Law Acts of 1838, 1843, 1847, and 1849, provided for such rates to be levied off the land. The 12 & 13 Vic., cap. 104, sec. 27, contemplated a possible expenditure in this way of £9,000,000. So far as the Ulster tenant-right has by payment from tenant to tenant rendered unnecessary the resort to an emigration-rate, it has lightened the burden upon land; and it has been moreover of Imperial importance in that the emigration it has promoted has been of the satisfied and prosperous, not of the discontented and miserable sort.

Whether, then, we regard the improvements or goodwill elements of the tenant-right, we find in it nothing to detract from the value of the landlord's estate. And such has been the fact. The statement of Mr. Gladstone, made when introducing the Land Bill into the House of Commons, and repeated by the Lord Chancellor of England in the House of Lords, has never been contradicted, that in tenant-right Ulster since Arthur Young's days the rental more than trebled, while in the other provinces it less than doubled. "Nothing," said Lord Lurgan, "could work better *for the landlord*, the tenants, and all classes concerned. He had formed that opinion from the experience he had acquired in his own property, and also from the adjoining estates, with the mode of managing which he was thoroughly conversant" (Speech on Land Bill in the House of Lords, 1870.)

Before Lord Clanricarde's Committee, 1867, all the persons examined who had experience of the Ulster tenant-right refuted the flippant phrase, "tenant-right is landlord-wrong." W. Steuart Trench, Esq., said :—

"The land in the north of Ireland with which I am acquainted is let higher at this moment, in proportion to its intrinsic value, notwithstanding the tenant-right which exists there, than the land in other counties which I have to deal with."

In another place he says:—

"I am decidedly of opinion that tenant-right is practically in favour of the landlord."

Mr. Russell, agent to estates in Meath and Donegal, was asked—

"Are rents in general lower where tenant-right exists than in other parts of Ireland where it does not?—I should say not. I should say that Meath, where tenant-right does not exist, is perhaps the lowest-rented county in Ireland that I know of; and it has some of the finest land."

And to a similar effect was the evidence of Mr. Filgate, Lord Downshire's agent. This evidence could be multiplied indefinitely.

Another objection to the tenant-right made in the interest of the landlord is that it stands in the way of improved estate management and the consolidation of farms. But it is a fact that the best-managed estates, and those peopled by the most comfortable tenantry, are those where the full tenant-right system prevails; and that it is on these that a natural system of consolidation has been best put in force.

The evidence of Mr. Filgate, before Lord Clanricarde's Committee, 1867, sets this in a striking light:—

"It is a curious circumstance that taking Lord Downshire's estate in the part which I have immediately under my own management, and comparing what has been going on in the way of consolidation for the last 14 or 15 years, the very same thing has been occurring there where we have no ejectments, and where we have literally no arrears of rent, as has been going on in the south and

west. The turning point is very much the same. The farms below 15 acres have decreased, and farms above 15 acres have increased."

It has been further objected that the tenant-right prevents a landlord having complete control over his property, as he has to purchase out a tenant whom he desires to dispossess. The objection in regarding the landlord's, loses sight of the tenant's property. Besides, the hardship is not very serious of asking a landlord, designing changes to improve the money-value of his property, to compensate a tenant whom he deprives of his means of livelihood, for the purpose of increasing his own rent-roll. And, as Mr. Trench says:—

"It is rather a question of feeling than of actual practical loss: as a money question, the absence of loss by insolvency would, in nine cases out of ten, more than cover the compensation for any surrender of land he might require."

An objection is made to the tenant-right that it strips the incoming tenant of the capital necessary to work his farm. "This does not happen so often as is generally supposed," says Mr. W. Steuart Trench.\* We have seen† that it is generally the insolvent tenant who sells. It is the man who has accumulated capital who is the incomer. Mr. John Hancock has stated that "the men who purchase and pay for tenant-right are the most active and enterprising portion of the tenantry;" and that "in his district the incoming tenant rarely invests all his capital in the purchase; and even when he does, from the small size of the farms, his increased exertion

\* Evidence before Lord Clanricarde's Committee.

† See *ante*, p. 52.

and energy soon enable him to prosper." A mass of testimony to the same effect could easily be quoted from the evidence of land agents before the Devon Commission.

The leasehold tenant-right has all the economical reasons in its favour which support the yearly tenants' tenant-right. It has the additional reason that it protects the farm from deterioration during the latter years of the lease.\* In 1845, the Land Occupation Commissioners reported that "anomalous as this custom is . . . we are sure that evils more immediate, and of a still greater magnitude, would result from any hasty or general disallowance of it, and still less can we recommend any interference with it by law." What would they say now, two years after Parliament had given the sanction of law to the custom in its entirety, if they were asked to report whether they would recommend interference by law with a custom admittedly beneficial to all parties, and one to the protection of which the faith of Parliament had been pledged ?

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\* See *ante*, p. 102.

## BOOK III.—LEGAL.

## CHAPTER I.

## NATURE OF THE ULSTER TENANT-RIGHT.

WE have found, as a matter of fact, that the leasehold tenant-right has always been included in what is "known as the Ulster tenant-right custom;" that at the determination of a lease, the occupying tenant of leased lands was in the same position as the ordinary yearly tenant on the estate; that he had an "interest beyond his lease," which he could sell, if he was voluntarily quitting or the landlord desired to resume possession of his holding, or for which, if it was necessary that his farm, or a portion of it, should be consolidated with an adjoining farm, he was entitled to a fairly-valued tenant-right compensation.

Our investigation into the facts of the custom has, I trust, effectually dispelled the common idea which confines the tenant-right to the right of sale. In popular parlance, this phrase is pardonable enough, as it indicates the ordinary way in which the tenant-right was realized. A tenant desired to part with his farm, in nine cases out of ten, because being insolvent and deeply in arrears of rent he could not hold on any longer. He sold his interest sometimes with, sometimes without asking the landlord's permission. In either case the purchaser was presented to the landlord, and if there was no objection to his character, the landlord accepted the purchaser as tenant, being glad to exchange an insolvent for a solvent tenant, and to get in the arrears of rent. The

privilege accorded in cases of this sort may be fitly enough described as "the right to sell."

In logic, the right to sell cannot be the differentia any more than it is the full definition of the tenant-right custom. The right to sell is the right of everybody who has property which is transferable. The law gives every yearly tenant, every leaseholder, whose lease does not prohibit or restrict alienation, the right to sell. It needs no custom to confer this right. There must be something further: what is it? What is the thing sold? Not the mere right of occupation under a yearly tenancy, which may be determined in six months—not the mere interest in a lease which may expire in a still shorter period. It is not for these that the enormous sums are given which indicate the valuable nature of the Ulster tenant-right.

There are three things essential to the existence of a tenant-right interest:—

1. The fairly valued rent.
2. The continuousness of the interest beyond the legal determination of the tenancy.
3. The right of realizing the value of the interest before removal.

(1.) The fairly valued rent lies at the very basis of the custom. During the existence of the tenancy yearly or leasehold, it marks the value of the tenant-right interest—an interest which exists independent of sale. Its value may, it is true, on transfer be realized by sale; but even then it may be, and, as we have seen, often is determined by arbitrators or by a competent valuator. There is no sale in the ordinary cases of enjoyment of the tenant-right—the undisturbed occupation at a fair rent, and the transmission of the interest

by will or intestacy, burthened with charges to its full customary value. The rent may be raised so high as to encroach upon or even destroy the tenant-right. A rack-rent, or a rent determined by competition, is inconsistent with a tenant-right. Yet even under such a system, there may be a right to sell; there may even be an interest which can be sold; but this is not tenant-right. It is not what is "known as the Ulster custom." The fair rent under the Ulster custom takes account of the tenants' permanent improvements: it takes account of his good will. These two elements of the tenant-right, the tenant's interest in his improvements and in the good will are excluded from the valuation for a fair rent.

(2.) Something more is required as an essential of tenant-right than a letting at a fair rent—there must be an expectation derived from general practice or custom, of the continuousness of the interest. No one would give 10 or 20 years' purchase for a farm held from year to year, even at a fair rent, if it were understood that the landlord had the right under the custom of utterly annihilating that interest by a determination of the tenancy through a six months' or even six years' notice to quit. No one would give a similar price for a farm under lease when only a few months of the term remained unexpired, as we have seen, is of constant occurrence, if it were understood that the interest disappeared with the technical determination of the lease; and no one would give as much for the leasehold interest in the last as in the first years of the lease. Yet we have seen that as a matter of fact these things are of constant occurrence in Ulster. They mark the prevalence of tenant-right. They exist under no other



system. Though startling to strangers, they are so common that they excite no observation in Ulster.

The tenant-right interest must necessarily exist beyond the technical determination of the tenancy. Hence it is that even though a tenant's interest has been technically determined by notice to quit or the fall of a lease, or even by a judgment or decree in ejectment, the interest continues realizable by sale or valuation. The tenancy may be technically at an end, but the tenant remains "in by the custom" till he receives the value of his interest—from the incoming tenant, if there be one; if there be none, from the landlord.

3. The rent, then, having been fairly fixed, the value of the continuous interest thereunder called the tenant-right is properly determined by the competition of a free and open sale. Whenever competition cannot operate, the sum to be paid for tenant-right must be determined by arbitration or by valuation, the arbitrators or valuers determining what the tenant-right would realize if fairly sold in open market.

I shall have to consider another system, not of determining, but of arbitrarily fixing the value, which is of recent origin, and arose at a time when the tenant-right had no legal protection—the system of fixing by an unbending office-rule of so much per acre or so many years' rent the price of the tenant-right under every variety of circumstance. This system never became a custom. It is wanting in all the characteristics of usage. It is in its nature, and was intended by its authors to be, destructive of the custom. That the limitation stopped short of annihilation of the tenant-right was due to the inherent strength of the custom. It was the homage paid to its unprotected equity. But this important

subject I reserve for a subsequent chapter. It does not affect the immediate question before me—the legal existence of the leasehold tenant-right.

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## CHAPTER II.

### THE SUCCESSION TO THE TENANT-RIGHT.

IT has been stated that the most frequent mode in which the tenant-right was transferred was by will or on intestacy. The tenant's will disposing of the tenant-right of the farm was recognized, whether as in the time of the forty-shilling freeholder the landlord's political expectations were satisfied by subdivision among the sons or, as in later times, by transmitting it undivided to some one of their number. The policy of preventing subdivision has now been of such long and general continuance, and has been so acquiesced in, that it may be regarded as on most estates and in most districts an essential part of the custom. But if the tenant left his undivided farm to one son, it was subject to dower for the widow and charges for the younger children. Or if he left "the farm" to be divided—the landlord who objected to this, and insisted on preventing subdivision, always took care that the person who got the entire farm should out of the value of the tenant-right pay the chargeants upon it the sums to which by arbitration or a fair valuation they were considered equitably liable.

If no disposition was made of the tenant's interest by will, some member of the family was selected in "the office" to succeed to it. Frequently an invidious selection was avoided by keeping on the deceased tenant's

name in the rent books, thus leaving the family in joint occupation. By some who have regarded the custom superficially, or who have not been intimately acquainted with its working, this has been considered a part of the custom, and being so as giving the landlord a right to deal with the tenant's interest as he pleased, provided he gave it to some member of the family.

As a matter of fact, arbitrary dealing of this sort never received sanction under the custom. True, subdivision was prevented, by making one member of the family the legal tenant; but the tenant-right interest, valued in some form, was divided amongst the other members of the family, sometimes without the knowledge, sometimes by the direction, or even commands of "the office." If cases of a contrary nature have happened, where the landlord has given the farm to one son, compelling the other members of the family to be turned out upon the world without receiving any portion of the value of their father's tenant-right—they are only instances of arbitrary dealing, the result of the want of legal protection for the tenant-right.

But to draw from cases of this sort the wide conclusion that the tenant-right is not legal assets; that the landlord's *arbitrium* supersedes the law of the land, the Statutes of Distribution, and the jurisdiction of the Court of Chancery in the administration and distribution of assets, is too monstrous to require refutation.

That is no part of the custom, which arose from the non-recognition of the custom. Had the custom been all along legal, the "equity jurisdiction of the office" could never have arisen; now that it is legal, the tenant-right becomes legal property, falling within the cognizance of the Courts of Chancery and Bankruptcy, under

the general principles of the law. The office administered—cheaply, at all events, if not always satisfactorily—a property which the law would not recognize. It issued its decree, under the sanction of the notice to quit, selling the tenant-right and distributing amongst creditors the sum realized, after the rent arrears had been discharged. It administered the tenants' tenant-right estate under his will or on intestacy; it settled who should have the farm, and what he should pay to the devisees or next of kin. This was done, it only could be done, because the law did not recognize the tenant-right. But, now that the law has given the recognition which was wanting, the power ceases, its *raison d'être* being gone.

The Land Act, by legalizing the custom, has not authorized the establishment of a Court of Equity and Bankruptcy in every estate-office to administer the property which the Act has called into legal existence. An excrescence on the custom—an useful development, rather—which grew up in consequence of its non-recognition, is no part of what is “known as the Ulster tenant-right custom;” nor if it were, is it made enforceable otherwise than “in manner provided by the Act.”

To introduce the jurisdiction of the Courts of Chancery and Bankruptcy, to determine conflicting rights to the value of the tenant-right interest, is in reality no interference with the tenant-right custom. It is the simple result of the legal recognition of a property not previously admitted to be property. The landlord can still compel the sale of the farm—can still prevent subdivision—can still prevent an improper tenant being thrust upon him; but he cannot do what, as a matter of fact he never did do, though he could have done so—forfeit the

tenant-right interest of a tenant who subdivided in life-time or by his will. The custom, which was founded on old equity and the sense of fair dealing which obtained between landlord and tenant in Ulster, abhorred forfeiture, as it did all form of injustice. It distinguished between the resumption of the farm, and the acquisition of the tenant-right.\* The landlord might put out the tenant—he never put into his pocket the tenant-right. The landlord's rights remain—the tenant's right has

\* The provisions of sec. 13 of the Land Act respecting compensation in cases of assignment deserve notice. Compensation for improvements or incoming payments cannot be forfeited by any dealing of the tenant in the nature of assignment. The landlord may resume the farm for assignment—but he cannot deprive the tenant of compensation under secs. 4 and 7. These two sections make up the tenant-right, in cases where the tenant has given money or money's worth on coming into the holding.

It is only compensation for disturbance which can be lost in certain cases of assignment:—

(1) Where the rent is one year in arrear.

(2) Where assignment without the consent of the landlord is “not warranted by the practice prevalent upon the estate.”

(3) Where the refusal to accept the assignee is reasonable.

But mark the proviso:—

“The transmission of a tenancy by bequest to the husband or wife, or to any one child or grandchild, or to any one brother or sister, or to any one child or grandchild of a brother or sister of the tenant, or the devolution of a tenancy by operation of law upon an intestacy or marriage, shall not be deemed an assignment within the meaning of the section.”

This section does not apply to the Ulster custom, but by its minute specifications and its liberal spirit, it indicates the intention of the Legislature to prevent forfeiture of the tenant's right. In this as in other portions of the Act, it will be found that the custom is still more and not less liberal than the general provisions of the Act.

received legal sanction. As a result, that interest passes under the protection of the general law of property. The Queen's Courts step in to deal with it so far as it is property: the agent's Court—however in the absence of cheap equity jurisdiction to be regretted—must disappear, not having adequate power to enforce its decrees; but it cannot put up its moral jurisdiction in opposition to the legal jurisdiction of the Queen's Courts.

## CHAPTER III.

### THE LEGALIZATION OF THE CUSTOM.

THE custom being such as we have described, and extending, as we have seen it does, to leased lands, I now come to consider the legal aspects of the question. How stands the *law*? Does the first section legalize the actual custom in its entirety; or has it failed in its application to that large body of customary tenants, the leaseholders of Ulster?

The legalization of the custom is contained in the first paragraph of the first section—

“The usages prevalent in the province of Ulster, which are known as, and in this Act intended to be included under the denomination of the Ulster tenant-right custom, are hereby declared to be legal, and shall in the case of any holding in the province of Ulster proved to be subject thereto, be enforced in manner provided by this Act.”

The section also provides that

“A tenant of a holding subject to the Ulster tenant-right custom, and who claims the benefit of such custom, shall not be entitled to compensation under any other section of this Act; but a tenant of a holding subject to such custom, but not claiming under the same, shall not be barred from making a claim for

compensation with the consent of the Court, under any of the other sections of this Act, except the section relating to compensation in respect of payment to incoming tenant."

The section also declares two events in which a holding shall cease to be subject to the custom ; the first

"Where the landlord has purchased or acquired or shall hereafter purchase or acquire from the tenant the Ulster tenant-right custom to which his holding is subject, such holding shall thenceforth cease to be subject to the Ulster tenant-right custom."

The second case of extinguishment occurs

"Where such last-mentioned claim [*i.e.*, 'claim for compensation, with the consent of the Court under any of the other sections of the Act, except the section relating to compensation in respect of payment to incoming tenants'] has been made and allowed, such holding shall not be again subject to the Ulster tenant-right custom."

There is here no attempt at defining the custom ; no restriction on its application, no limitation of its extent. So anxious was the legislature to avoid any definition which might in the slightest degree alter the custom that the words in the original bill were changed, which appeared to define the custom as having reference solely to compensation.

The opening words of the first section in the original Bill ran as follows :—

"The usage prevalent in the province of Ulster with reference to the compensation to be made or allowed to or on account of an outgoing tenant of a holding."

The words limiting the custom to compensation were struck out.

The second section legalizes similar usages outside Ulster, and contains exactly similar provisions. Then follow a series of sections giving compensation to non-customary tenants, and defining the limits of that

compensation. They are borrowed from the analysed elements of the Ulster custom—but under many restrictions and provisoes.

We have no reference to the Ulster custom until we come to the 16th section ; and it is perfectly plain that none of the intermediate sections <sup>except, as at length has been</sup> ~~(not even~~ the 15th) is ~~intended~~ <sup>decided</sup> intended to apply to the Ulster custom.\*

The procedure is set out in sec. 16. It is by claim against the landlord—

“Every tenant entitled under this Act to make any claim in respect of any right, or for payment of any sums due to him by way of compensation, may serve a notice of such claim on his landlord,” &c.

Again, we see the anxious desire of the Legislature not to interfere with or restrict the actually existing custom. The distinction made in the first section between claiming “the benefit of the custom,” and claiming “for compensation” is kept up in this section. This section distinguishes between a claim “in respect of a right” and a claim “by way of compensation.” The former can only refer to a claim under a custom—inasmuch as all claims under the general provisions of the Act, are by the statute made claims for compensation. So, a claim under the custom may be, and generally is, a claim for compensation. But there may be a claim under the custom by way of right. The distinction is kept up in the form of notice of claim in respect of an Ulster tenant-right custom in the Judges’ Rules.

\* Mr. Gladstone, in introducing the Bill, said—“The House will please to understand that, speaking generally, this clause (clause 1), with regard to the Ulster custom, is an isolated clause. It provides separately and completely for all that class of holdings”—(Hansard, *Debates*, Vol. 199, p. 367).



"The said A. B. claims to be entitled to the benefit of the following tenant-right custom, viz. [*here set out the right claimed*]; or claims the following sum as due to him by way of compensation under a tenant-right custom, viz. [*as before.*]"

The sections immediately following deal with the form of procedure, and the constitution of the Court. The last paragraph of sec. 23 is important.

"Any order made by the Chairman under this Act may be enforced by attachment or otherwise in the same manner as if it were the order of any of the Superior Courts of Common Law at Dublin; and if such order made by the Chairman be for the payment of money, it may also be enforced in the same manner as civil bill decrees for money demands made by such Chairman."

An order for payment of money may be enforced like any civil bill decree; an order on a claim "in respect of a right" may be enforced by attachment.

The interpretation section (sec. 70) defines what "tenants" may make claims. It is as follows:—

"The term 'tenant' in relation to a holding shall mean any tenant from year to year, and *any tenant for a life or lives, or for a term of years under a lease or contract for a lease.*"

The 71st section limits the application of the Act, and consequently the legalization of the Ulster custom, to holdings agricultural or pastoral in their character, or partly agricultural and partly pastoral.

Such is the legislation of the Land Act in reference to the Ulster custom.

## CHAPTER IV.

### THE LEASEHOLD TENANT-RIGHT THE QUESTION OF LAW.

Is the customary leaseholder of Ulster within the legislation described in the last chapter? Nothing is so

striking as the extremely scrupulous care with which the Legislature avoided the use of any language which could possibly limit or restrict beforehand the full operation of the custom in agricultural or pastoral holdings. Tenants by lease as well as yearly tenants are, *primâ facie*, within its scope. But the application of the custom must be proved as a matter of fact by the yearly tenants as well as by leaseholders. There is in the Act no presumption in favour of the yearly tenant which does not exist in favour of the tenant under lease. Both are, *primâ facie*, within its provisions, if the matter of fact under the custom is proved.

It is otherwise in the general provisions for compensation. Here we have distinctions in the treatment of tenants under lease and tenants for years—tenancies created after and tenancies created before the Act—leases for lives and leases for years—leases for thirty-one years or more and leases for less. Similar distinctions may or may not exist under the facts of the custom. But the Act is silent, and its silence is as expressive as its printed words. It merely provides in its definition of tenant that none of them shall be excluded, if the matter of fact of their inclusion is thereafter proved.

Is it more startling, then, to find the Ulster leaseholder claiming the benefit of the custom than the Ulster yearly tenant? The 4th section gives compensation for improvements to both unless the "*right to such compensation is expressly excluded by a lease or written contract made before the passing of the Act.*" A lease of lands valued under £50 or written contract made *after* the Act cannot by any form of words exclude the right to compensation. The 7th section gives compensation for incoming payments to leaseholders as well

as yearly tenants, excluding from its application money or money's worth paid during the existence of a lease made *before* the Act, money paid under a lease being regarded as not necessarily a fair test of value. There is no limitation in the case of a lease made *after* the Act—leaseholder and yearly tenant have identical rights. The 3rd section excludes tenants by lease made before the Act, as it does tenants from year to year of more than £100 value, under tenancies created *before* the Act. A lease for lives or for any term of years certain less than 31, made *after* the Act, is under the same provisions as a yearly tenancy in respect of compensation for disturbance.

All the elements of the Ulster custom—the payment for good-will, for improvements, for “input—” under their statutable names of disturbance, improvements, and incoming payments—are more or less fully participated in by the non-customary leaseholder. Why should it seem strange that the customary leaseholder, any more than the customary tenant from year to year, should claim these several payments in their composite form—the Ulster tenant-right? Not surely the absence, under the custom, of limitations and restrictions imposed upon the non-customary leaseholder on receiving statutable benefits he never customarily enjoyed; for a similar difference exists in the case of the yearly tenant. Under the custom there is no scale of compensation for disturbance of a tenant varying with the value of the holding from seven years' rent as a maximum down to one year's rent; there is no limitation of the amount to £250, nor of its application to holdings under yearly tenancies valued at £100 and under; there is no forfeiture for non-payment of rent or for breach of covenant generally; there is no distinction between tenancies created before

and tenancies created after the Act. The tenant from year to year and the leaseholder are equally under restrictions and limitations in the enjoyments of their newly-created statutable rights, which do not exist under the customary rights of old time enjoyed by the Ulster tenant.

But it is said, the tenant has, by the covenants in the lease, bargained away his rights under the custom. I admit the argument, if "his right to compensation," or "claim in respect of a right," is, to use the language of the 4th section, *expressly* excluded by the lease or contract; or if there is anything in the transaction to show that the lease was actually meant to be a "purchase or acquisition" of the tenant-right; such as in the case put by Mr. M'Lagan when moving his amendment (see *ante*, p. 53), a reduction of rent below the ordinary customary rent of the district, in consideration of the tenant foregoing his customary "interest beyond the lease." This equally with the giving of a bulk sum would certainly be to acquire or purchase the tenant-right.

The section expressly declares that a landlord may extinguish the custom by purchasing or acquiring\* the tenant-right. The maxim *expressum facit cessare tacitum*, "the expression of one thing is the exclusion of another" is "never more applicable than when applied to the interpretation of a statute"—(Broom's *Maxims*, p. 664).

But is the covenant to deliver up the premises with the improvements thereon effected, at the end of the term, apart from any transaction in the nature of purchase, "an express exclusion of the right to compensation?" The statute has added in the case of all

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\* See *post*, chap. viii.

tenancies a new incident, "subject to compensation," which of old time, and as a matter of general practice, now made legal and enforceable against the landlord, existed under the custom. With this legislation in our hands, can it be said that the payment of compensation under the custom "if expressed in the written contract would make it insensible or inconsistent?"—(*per* Lord Campbell, *Dale v. Humphrey*, 7 E. & B. 274).

But what covenant is expressed in an ordinary lease which is not implied in a tenancy from year to year? There is no magic in writing, or calling a thing a lease. "An implied covenant or agreement is one which the law intends and implies from the nature of the transaction"—(Woodfall, *Landlord and Tenant*, p. 124). It is an implied covenant or agreement to "use the buildings in a tenantable and proper manner, and to manage and cultivate the lands in a good and husband-like manner according to the custom of the country"—(*Ibid.*, p 124). It is an implied covenant or agreement, on the part of a yearly tenant, to deliver up the premises with all the improvements thereon, on determination of the tenancy, whether written or parol, by notice to quit. By statute 23 & 24 Vic., c. 154, secs. 26–31, certain implied covenants or agreements are attached to leases or demises, or *other contracts of tenancy* made after 1st January, 1861, against burning the soil, working quarries, or cutting turf "for any purpose of trade or manufacture, or for profit or sale," lopping trees, &c.—covenants which of late years have become usual in leases. By the same statute, every lease of lands made after 1st January, 1861 (unless otherwise expressly provided by such lease) implies agreements on

the part of the tenant to pay when due the rent reserved; to keep the premises in good and substantial repair and condition; and to give peaceable possession of the demised premises on the determination of the lease (subject to any right of removal or compensation for improvements that may have arisen in respect of them) (sec. 42).

A yearly tenancy is as absolutely determined by the expiration of a notice to quit, as a leasehold tenancy, by the expiration of the term in the lease. In both cases the tenant is bound—in the former by implication of law, in the latter by expression of the parties—to deliver up the premises with all the improvements thereon. In the case of an Ulster tenant there has been felt to be no inconsistency in fact or in law in claiming or obtaining the benefit of the custom, on the determination of a yearly tenancy; no inconsistency in fact in claiming or obtaining the benefit of the custom on the determination of a lease. If there is no inconsistency in law in the case of a yearly tenant, on what ground of reason is there an inconsistency in law in the case of a leaseholder? \*

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\* The general law of Ireland now goes infinitely beyond the law of England in annexing the incident of compensation to contracts of tenancy; but it is worth noting that under the English judge-made law of agricultural custom, a custom is not inconsistent with the *lease* or the terms of the *tenancy*, which applies only at the *expiration* of the tenancy. In *Holding v. Pigott*, 7 Bing., 478, the outgoing tenant claimed compensation for wheat sown after turnips, according to the custom of the country. The custom of sowing *after turnips* was inconsistent with, nay was a direct breach of the covenant in the lease to sow wheat *after summer fallow*. But Lord Chief Justice Tindal, in giving judgment, said:—"The rights of the landlord and tenant may be governed by the

But the argument is infinitely stronger. The Court is bound, by the legislation of the Act, to enforce the Ulster custom, which, as a matter of fact, has been ascertained on the evidence adduced before it. Why is the Court to impose limitations and restrictions on the custom, proved as a matter of fact, which the Legislature has not imposed? Is the Court, when it deals with sec. 1, to substitute for the definition "tenant" in the Act a definition confining it to a tenant from year to year? The Legislature used the limiting term "tenant from year to year" in the 3rd and other sections: it did not do so in the 1st section. Is the Court to do what the Legislature has not done? If the Court excludes the leaseholder as a matter of law, when, as a matter of fact, he is not excluded, is it not altering instead of administering the law? Is it not introducing the words "from year to year" into the phrase "tenant claiming in respect of a right?"

But I go further. I ask, by what right or reason of law is the custom of tenant-right *now* sought to be accommodated to legal ideas and maxims formed when it had no existence? What was the object of declaring legal a custom which the law could not recognize because it was inconsistent with legal maxims and ideas, but to emancipate it from subjection to them? What would be said to an argument of this sort—"True, the custom

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terms of the agreement during the *tenancy* and by the custom immediately afterwards. On these grounds we think the custom still applies to give the off-going tenant the right, . . . and we are glad to find the law concurs with the justice and honesty of the case." Such was the language of a great English judge, and such the law of England in 1831. Neither the spirit of the English Bench nor the letter of the English law has altered since.

is legalized, but it is a maxim of law that a custom must have existed from the time of King Richard I.; show that there is a custom of that date 'prevalent in the province of Ulster, and known as the Ulster tenant-right custom,' and I will admit that you may enforce that custom against the landlord, but none other; for there must be no inconsistency between the general law and the 1st section of the Land Act?" The answer would straightway be returned—"No: you mistake the object of the section, which was to render unnecessary the reconciliation you speak of; to blot out of the roll of the law, in its application to the Ulster tenant-right, those maxims and rules which theretofore prevented its recognition; to bring the custom within the pale and under the protection of the law, though theretofore the two were in every point at deadly variance; to make the matter of fact matter of law, and as such enforceable against the landlord."

The Ulster tenant-right exactly corresponds with nothing previously known in the law. It is not the English copyhold any more than it is the English law of agricultural custom. It falls short of the one; it immensely exceeds the other; it bears analogies and resemblances to both. Custom, which has formed so large a part of the law of England, as of every free country—so small a part of the law of Ireland, as of every subjugated country—was recognized as law in the case of the English copyholder. Judicial decision, anticipating legislation by boldly developing the legal principle, which declared the English tenant entitled to his away-going crop, into a recognition of all usages giving the outgoing tenant compensation for temporary or even permanent improvements, declared legal the



agricultural customs of the country. In Ireland legislation has tardily done what judicial decision failed to do, when custom as a legislative power had lost its strength. In giving legal life to the Ulster tenant-right the legislature set the courts free, nay, directed them to do not more but less than what had been done by judicial decision in England, when the customary tenants of manors, who were "*tenants at will* by copy of court roll, being in truth bondmen at the beginning, but having obtained freedom of their persons, and *gained a custom by use of occupying their lands*, were called copyholders, and were so privileged that the lord *could not put them out, and all through custom*"—(Bacon's *Use of the Law*). "That was a great stretch of law," says Mr. Finlason, "when it is borne in mind that the custom could hardly have been, in the strict legal sense immemorial, as every tenant on his entry acknowledged his tenancy to be at will"—(*History of Tenures*, p. 7).

The question is not now whether the courts in recognizing the leasehold tenant-right, in the face of the covenant in a lease to deliver up the premises at the end of the term, would be doing as strong a thing as was done when the tenant at will of a manor was declared entitled to a heritable estate, and all through custom which had no strict immemorial existence. The courts in Ireland refused to recognize any custom in favour of the tenant, save in respect of away-going crops. The legislature has interfered, and struck down the legal impediments to the recognition of the Ulster custom of tenant-right, and has directed the courts to legalize the custom in its entirety. The question, therefore, is whether with this legislative direction, the courts are now to say that they are precluded by legal maxims

from doing something much less than was done by the courts in England without the interposition of a statute.

The Ulster tenants' claim at the end of a lease is to continue in occupation at a fairly valued rent, or if the landlord desires to resume possession that he shall have the right of sale of his occupancy at such fairly valued rent, or the fair value thereof as if so sold to a solvent tenant. The claim is not one purely of continuous occupancy. It allows the landlord's right of resumption, but subject to compensation to be ascertained by sale or by the fair valuation of the tenant-right.

But suppose it stopped short at the claim of continued occupation, wherein legally would the position of an Ulster tenant by lease, which bound him at the end of the term to deliver up possession to his lessor, differ from the position of the customary tenant of a manor who on entry acknowledged that he held at the lord's will? Would the inconsistency between the common law and the custom be greater in the former case than in the latter? Would it not be less?

But the Ulster tenant-right claim is not this: it is in the alternative. It gives an option to the landlord to resume possession. It admits this right, adding these words only, "subject to the right of sale, or to fairly valued tenant-right compensation." Where is the slightest shade of inconsistency between the general law and the custom, when the legislature has declared in the case of an existing lease that the ordinary covenant is to be no bar to compensation for improvements; in the case of a future lease, no bar to compensation for disturbance and improvements?

And be it remembered that "a custom shall not be taken to be unreasonable because it is contrary to the

common law, for the customs of gavel-kind and borough English are contrary to the common law, and yet they are allowed to be good"—(*Case of Tanistry*, Sir J. Davis's Reports; and 3 Salk., 100). This is so without an Act of Parliament declaring the custom legal and enforceable. Is it less so when such an Act has been passed? Or is this the argument that an Act of Parliament cannot possibly do what judicial decision without an Act of Parliament has done?

If then, the legalization of the Ulster custom in the case of leased lands has failed, it is because the court refuses to recognize as legal what the legislature has declared legal, and has given the court authority to enforce—a result which would be unprecedented in the administration of a statute. It would be virtually to declare judicially a new custom in Ulster, for which I venture to say, a single particle of proof cannot be found—the right of ejecting a tenant at the end of a lease without allowing him a farthing of tenant-right compensation. Recently at the hearing of a claim before a chairman of an Ulster county, the agent of a landlord who disputed the leasehold tenant-right, though admitting the yearly tenants' tenant-right, swore that in no single instance *before* the Act passed had any leaseholder been treated as in the two cases from that estate which came into court *since* the passing of the Land Act. It would be a curious result of that legislation which would enable the landlords to overturn the custom of their estates, long established and never in a single instance violated, of allowing the leaseholder a tenant-right interest of occupation on the termination of his lease, and to put into their own pockets, in the shape of increased rent or a fine, the value of that interest. For

the claim of the landlord is to eject the leaseholding tenant without compensation; to treat him as a trespasser and a stranger. The Act in this view of it might be described as an "An Act to destroy the leasehold tenant-right, and to enable the landlord to enforce its destruction and pocket its value."

But, it may be said, the Ulster tenant is entitled to compensation for his improvements. True, he is so entitled; *but not through custom*. The legislature, as a protection, in addition to the custom, gave the *tenant* the option of claiming under the general provisions of the Act. But it assuredly did not give the *landlord* the option of compensating his customary tenant under these provisions. This is no answer to the leaseholder's customary claim, any more than it would be an answer to the customary claim of the yearly tenant, that the legislature as an additional favour gave him too the option of claiming under the general provisions for compensation.

The tenant claims the custom which, as a matter of fact, exists: to deny him that is to destroy the custom, and hand over its benefits to the landlord. This would be legalization of the custom with a vengeance—the transfer from tenant to landlord of a tenant-right property, amounting on the very low estimate of 12½ years' purchase of the tenement valuation of the lands under lease to £5,500,000, of which less than one-third would be recoverable for improvements under the 4th section with all its restrictions and limitations, the remaining £4,000,000 representing the good-will element of the Ulster tenant-right, every penny of which as tenant-property, on the faith of which money had been paid by incoming tenants, and lent by creditors,

charges made under wills and settlements, and labour expended, would be confiscated!

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## CHAPTER V.

### ARE ESTATE RULES USAGES?

ADMITTING that the leaseholder has a tenant-right interest at the termination of his lease, is its value to be determined by free sale or fair valuation, or by the arbitrary edict of the landlord? In other words, are the estate rules restricting tenant-right compensation to so much per acre or so many year's rent, the usages described in the Act as "prevalent in the province of Ulster and known as the Ulster tenant-right custom," and which are made enforceable against the landlord.

Now, we have seen that the tenant-right custom is of very ancient date. The estate rules are of very modern origin. At the time of the Devon Commission, 1843-5, the practice of restricting the amount receivable by an incoming tenant, was spoken of as introduced four or five years before.

It followed, therefore, the introduction of a poor-law into Ireland [1838]. The burden of poor-rates, borne wholly by the landlord in the case of tenants valued at or under £4, one-half of it in the case of tenants valued above that sum, was a great stimulus, as I have pointed out,\* to the consolidation of farms, which political considerations had initiated. That process could only

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\* See *ante*, p. 42.

be carried out in Ulster, unless the tenant-right custom were to be utterly violated, by allowing the evicted tenant the value of his tenant-right. In consequence of the policy of consolidation, farms became limited in supply in an ever-contracting degree, and the demand increased in an ever-enlarging degree. The value of the tenant-right naturally rose. The landlord feared that the high prices paid would plunge the incoming tenant into debt, and gradually throw him on the poor-rates. Hence arose in many cases the attempt to restrict the sums given for tenant-right, an attempt which was very frequently evaded by secret payments, made by the incoming to the outgoing tenant.

Another and still more potent cause at work was the desire to abolish the tenant-right altogether. In some cases selfishness got the better of political and social sympathy. A feeling moreover of political antagonism was struggling into existence ever since 1835, when Sharman Crawford introduced his first Tenant-right Bill. The Ulster tenant began to claim the sanction of law for the custom which the landlord had been bound by moral considerations only to observe. The claim, if conceded by the legislature, would have made the Ulster tenant politically independent of his landlord.

Then followed the Report of the Devon Commission, with its attack upon the custom of Ulster, unwarranted by the evidence furnished by the practical experience of the province; soon succeeded by the suggestive passage in the *Digest* compiled under Lord Devon's special superintendence:—

“Landowners do not appear aware of the peril which threatens their property. . . . They do not perceive that the present tenant-right of Ulster is an embryo *copyhold*, which must

decline in value to the proprietor as the practice becomes confirmed, because the sum required by the outgoing tenant must regulate ultimately the balance of gross produce which will be left to meet the payment of rent. They do not perceive that the disorganized state of Tipperary, and the agrarian combination throughout Ireland, are but a methodized war to obtain the Ulster tenant-right, or that an established practice not only may, but must erect itself finally into law; and any one who will take the pains to analyse this growing practice will soon see how inevitable that consequence must be"—(*Digest*, Part i., p. 8).

Cupidity and the desire of political power were not appealed to in vain. The tenant-right could not be utterly and at once abolished without civil war, or at all events a total disruption of society in Ulster. But it could be gradually destroyed. Hence arose, in the generality of cases, the restrictions on the price of tenant-right, which were enforced, so far as was possible, in the case of tenants quitting their farms. Naturally all voluntary changes of occupancy were rare on such estates; and indeed only a small proportion of the farms have since changed hands subject to these rules.

It is the legal efficacy of these office rules, evaded generally in cases of sales between tenant and tenant, occurring only in a few solitary cases on the estates on which they were attempted to be enforced which I now come to consider. Are they "usages prevalent in the province of Ulster and known as the Ulster tenant-right custom?" If so, do they bind all the tenants of the estate, or only those who acquiesced in them?

To question the legal validity of the office-rules will appear to some persons, I have no doubt, a sort of heresy. "Did not Dr. Ball," they say, "propose an amendment, which was accepted by the Government, changing 'usage' into 'usages' with the very object of setting all

doubts on the question at rest? What could the plural form point to but the estate rules?"

To this it may be answered, "Dr. Ball's amendment was accepted because it did not really alter in the slightest degree the enactment; because even it was supposed to have the effect unintended by its proposer, of facilitating the proof, and legalizing more fully the varieties of the general and unrestricted custom; and it is not the only instance in the Act in which amendments intended to serve the landlord have had the opposite effect."

The one statement may balance the other. With neither have we concern in a legal argument. Our object is to find out what the language really means, not what it was intended or supposed by this party or that to mean.

Taking then the language of the Act as it stands, it seems to me, and I hope to show to satisfaction, that language, short of a direct negative, could not be devised better calculated to exclude the office-restrictions, while legalizing the ancient and general custom of the province.

(a) "*The usages*."—It is only usages that are legalized; not estate rules,\* office mandates, dictatorial ukases, arbitrary restrictions. To none of these is the term "usage" at all applicable. The very essence of usage (and of custom which is but immemorial usage†)

\* See *post*, p. 147, and Appendix A.

† The main distinction between custom and usage is that the latter must not, though the former may be opposed to the common law. This distinction only operated to prevent the judicial recognition of the usage. It does not exist where, as in the Land Act, the usage is by statute declared legal. An usage not opposed to common law need not



is voluntariness. It cannot be imposed by external authority. If an external authority, even the Legislature, imposes a rule upon the people of a district, that is not custom.

“Custom, as understood in law, is such an usage as has obtained *vim legis*, and is therefore a binding law for such particular places, persons, and things as it concerns; and such customs cannot be established by grant of the King or Act of Parliament”—(Sir John Davis’s *Reports*, “Case of Tanistry”).

The Land Act does not attempt to create or establish usage or custom: it “declares” to be legal usages theretofore existing, which the Judges would not, or rather could not recognize. A declaration in a statute is not a creation or an establishment of something new: it does not make that usage which theretofore was not usage: it simply gives that legal cognizance and protection which the Judges by declaring the common law have given to those general practices which could be fitly termed “usages.”

“Custom is *jus non scriptum*, and made by the people only of the place where the custom arises. For where the people find an act to be good and beneficial, and apt and agreeable to their nature and disposition, they use and practise it from time to time, and so by frequent iteration and multiplication of the act a custom is made, and being used from time whereof no memory was, it obtains the form of law. And so, though it is true that no law binds a people except that which is made by consent of the people, yet the *consent can be expressed in fact* as well as by word; and that [*consent*] which is expressed by many acts and continual acts of the same kind is custom. And so custom is a reasonable act iterated, multiplied, and continued

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necessarily be “immemorial, or even established for a considerable period, or uniform, or capable of being defined with precision and accuracy”—Taylor *On Evidence*, § 1076; *Juggomohun Ghose v. Manickchund*, 7 Moore, *Ind. App. Cases*, 263–282.

by the people from time of which memory does not run"—(*Ibid.*).

If we omit the element of immemorial existence, we have here an accurate description of "usage." Not that usage is exempt from the incident of existence for some length of time. This is involved in the idea of iteration and continuance; and so general practice, be it ever so multiplied, must show some reasonable length of existence to make it usage.

Can that be fitly or reasonably called usage which is only a rule of a landlord or agent, arbitrarily imposed, accepted reluctantly and through fear by an individual here and there, and evaded when possible, and only put in force in the exceptional circumstances of transfer by sale or removal—never in the usual circumstances of continuance and transmission by will or inheritance? Where in it do we find "the will," "the consent of the people," the "frequent iteration and multiplication," "the use and practice by the people from time to time," the "aptness and agreeableness to their nature and disposition"—of all in fact that constitutes usage? As well might the forcible abolition of the custom be termed an usage. And in truth the office restriction is a forcible abolition of a half, or three-fourths, or some proportion of the custom.

"As to the many customs which have been adjudged void . . . they have had their commencement for the most part *by oppression and extortion of the lords and great men*. All such customs, for that they had their commencement by wrong and usurpation, and *not by the voluntary consent of the people*, are bad and void in law"—(*Ibid.*).

It may be said that the general body of the tenantry by remaining silent and doing nothing, when an individual case of enforcement of the restriction happened on the estate, acquiesced in and gave voluntary consent

to the rule. But silence is not acquiescence. "Whence is it that immemorial possession gives right? Is it from the mere silence of the parties concerned to claim it? *No, silence gives no consent where ignorance or fear may be the cause of it*"—(Stillingfleet's *Ecclesiastical Cases*, 2d ed., 1702, p. 230). And if this is so where custom is under the shield of the law—how much stronger is it where the law does not recognize it? The Ulster tenants had no power to protest. The law did not recognize the custom. They were at the mercy of the landlord. Their silence was the result of reasonable fear of losing their all.

Nor is this all. The mass of them had no need to protest. Their tenant-right was not invaded. They continued on at the customary rent. They transmitted their tenant-right interest to their successors—charged to the full valuation of that tenant-right. They had no need to sell. Against what, then, were they to protest? Their silence under the circumstances meant nothing. It was no acquiescence.

It may be asked why use the plural form, if it is the one general custom of the province that is meant? The answer is plain—the legislature did not know whether there might not be, as no doubt there are, usages in the true sense of the term, varying in different districts, yet "known as the Ulster tenant-right custom." There might be, and no doubt there are usages, which have voluntarily grown up, of determining the value of the tenant-right in one district by public auction, in another by private sale, in another by arbitration or some other mode of fair valuation. There might be, and there are, the yearly tenant's usage of tenant-right, and the usage, necessarily modified, of the leasehold

tenant-right, yet both known as and in reality one custom of tenant-right, both usages of voluntary growth, having their commencement by voluntary consent of the people.

If then there may be, as there is a variety of feature in the custom, are we to apply the term "usages" in its natural and ordinary sense, as we clearly can do? Unless absolutely compelled, we should give the word its only natural meaning.

(b) "*Prevalent in the Province of Ulster.*"—These words are badly chosen, if they are intended to mean the estate restrictions on the price of tenant-right, "existing on the several estates in the province of Ulster." How can that properly be described as prevalent in the province, which *ex necessitate*, only exists on a particular estate, and necessarily differs from that existing on every other? The phrase is peculiarly appropriate to those usages which as they grew up with the consent of a people similarly circumstanced all over the province, are necessarily identical and generally prevalent therein.

But it may be said, by "usages prevalent in the province" are meant "usages prevalent in districts or estates in the province." It is surely a forced construction which requires so many interpolated words. But admitting this construction, it is far from the truth that the estate rules are prevalent even on the estate. They only apply to the exceptional circumstance of sale. They do not affect the mass of the tenants who, by virtue of their continuance in possession at a fairly valued rent retain their tenant-right unimpaired.

(c) "*Known as the Ulster tenant-right custom.*"—The voluntary usages have been known as the Ulster tenant-right custom; the office restrictions of prices were never

known as such—they have only been known as arbitrary violations of that custom. How could that ever be known as the *Ulster* tenant-right which only was heard of in a few instances on a single estate, and that within a comparatively recent period?

(d)—“*Declared to be legal.*”—Mr. Butt has pointed out the special significance of this phrase. He quotes Dwarrris:—

“Declaratory acts are made when the old custom of the kingdom is almost fallen into disuse or become disputable, in which case the Parliament has thought proper in *perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and has ever been.”

Mr. Butt adds—

“There are many modern statutes expressly said to be declaratory in their character, which are not intended to declare the common law, but only to provide that certain specified matters must be deemed to fall within its principles. . . . If the first section be held to be declaratory in either of these senses, it would not then be one enacting that in future the *Ulster* custom should be binding as law, but one declaring that it must be treated as if at all times it had been so, precisely as if the statute were one ‘declaring what the common law is and has ever been.’”—(*Treatise on Land Act*, p. 472).

Thus we see that every phrase used in legalizing the tenant-right of *Ulster* has been studiously employed to designate the ancient and general custom of the province—what Mr. Gladstone happily called “the authoritative traditions of the district,”\* and to exclude from even

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\* “We say that it prevails, that it is admitted, that it is recognized by the landlords—not by each man as his individual act, but in deference to the authoritative traditions of the district; that where it is impaired by the action of any landlord, or destroyed by the action of another, that action is against the authoritative traditions of the district.”—(Hansard, *Parliamentary Debates*, Vol. 199, p. 367).

the appearance of legal sanction the modern infringements and restrictions.

It has been decided by Mr. Justice Lawson in *Friel v. Lord Leitrim*,\* a land appeal which came before him at the Spring Assizes of Lifford, 1872, confirming the judgment of the chairman, that where tenant-right had at one time existed on a landlord's estate, and still subsisted in full force in the district, the fact of the landlord having denied the tenant-right to a number of evicted tenants for a considerable number of years [since 1854], was not notice to the other tenants so as to bind them, and did not prevent a tenant who had come in by a tenant-right purchase from obtaining tenant-right compensation. In other words, it was held that a landlord could not by his arbitrary action, destructive of the custom, for a number of years in the case of a few tenants whom he had evicted, absolve the bulk of his estate from the ancient custom which at one time existed upon it.

On exactly similar grounds, a landlord could not discharge his estate of the ancient custom, still prevalent in the district, by action in the case of a few tenants in recent years, destructive of one-half or one-fourth or any other proportion of their tenant-right. For this is what the office-restriction of price really means. There must be two parties to the destruction. And the mass of tenants on an estate who continue in occupation at a fairly valued rent, are so far from being parties to the destruction of their tenant-right, that they have actually retained with the consent of the landlord their tenant-right interest. The sale of that interest is an accident,

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\* Reported in Appendix.

not an essential of their customary right; and this, as it was never demanded, could never have been denied.

It is to be borne in mind that a few exceptions do not disprove an usage. If the usage is proved to be general, proof of exceptions is immaterial (*Vallance v. Dewar*, 1 Camp., 508). Still more so is this the case if the exceptions are the work of arbitrary power—instances of wrong and usurpation, wrought when the custom was left destitute of legal recognition.

If the office regulations constitute usages, binding on every tenant on the estate, it must be because they have been generally prevalent in every form of tenant-right transaction, and not merely in the matter of sale, and prevalent for a length of time long enough to constitute an usage, acquiesced in by the tenants, not imposed by wrong or usurpation, so that it may reasonably be supposed and believed that they formed a silent but well-understood element in every contract of tenancy to which it is proposed to apply them.

Nor is the rule to be overlooked which has governed the construction of custom, in the case of copyhold estates, but which is applicable to customs generally, and particularly to the conflict in Ulster between the old custom and modern innovation. In *Baspool v. Long*, 1 Croke (Eliz.) *Reports*, p. 879, "the whole court, without any great debate, held clearly that a custom which goes in deprivation or in bar of a copyhold estate shall be taken strictly;" and that a custom which goes in making and maintenance of the same, shall be taken favourably (see *Viner's Abridgement*, vii., 189). It is only by reversing this canon that the estate rules can ever be substituted for the general custom.

## CHAPTER VI.

## PROOF OF THE LEASEHOLD TENANT-RIGHT.

A SHORT sketch of the various modes in which the leasehold tenant-right may be proved will no doubt be acceptable to such of my readers as contemplate a resort to the Land Court, and to their professional advisers. I must premise, however, that these directions are of a general nature, having in view a claim fully setting out and accurately stating the tenant-right custom as set forth and explained in the foregoing pages. The varieties of the custom—I do not now allude to the rules and restrictions of estates, but to the voluntary usages of estates and districts—and the special circumstances of cases require special consideration, and will in many instances suggest peculiarities of proof, sufficient to establish the tenant-right in cases where the ordinary proofs may be wanting or not easily accessible.

1. The usual proof required and given is evidence of sales of the tenant-right interest on the determination of the lease. We have seen that sale is an exceptional incident of tenant-right. And the sale of the tenant-right interest on the determination of a lease is one of the rarest occurrences. But there are classes of cases which, though they may not have occurred on some of the very best administered tenant-right estates, will be met with on others.

(a) On estates where the lease granted has been for the tenant's own life, instances will probably be found of a sale after the tenant's death by his executors, in



order to carry out and discharge the trusts of the tenant's will.

(b) On all estates during the famine years, except those in which reductions were made to preserve the tenant-right, there will probably be found instances of surrender of the lease or of ejectment for non-payment of rent, where even after the execution of the *habere*, or decree for possession, the tenant was permitted to sell the tenant-right.

2. Instances of sales of the tenant-right immediately on the determination of a lease are naturally rare. There will frequently be found cases where the value of the tenant-right was determined by arbitrators or by some other form of fair valuation.

3. But the ordinary evidence of the existence of the leasehold tenant-right will be found in the continuance of the tenant in occupation at a fairly-valued rent, which allows the tenant an interest equivalent to that which the yearly tenant on the estate possesses. If tenant-right sales or valuations of the yearly tenants' interest have taken place, realizing large sums of money, and it is proved that the leasehold tenants have been continued at similar rents and have similar interests—this can only be consistent with the existence of a leasehold tenant-right.

4. Another form of proof will be found in the system of valuation pursued on many estates—which has been described in a previous chapter. A simultaneous valuation of the leased lands during the leases, and of the lands held by yearly tenants, on the same principles and at the same rate of valuation, the leaseholders at the termination of their leases being continued in occupation at the rents fixed by the general valuation of the estate, proves an

identity of tenant-right interest in leasehold and yearly tenants.

5. Proof from a variety of instances of the tenant-right of leased lands selling in the latter years of the lease as high as similarly rented lands in the first years of a lease, or held by yearly tenants, is only consistent with the existence of a tenant-right interest "beyond the lease," and is proof of the leasehold tenant-right.

6. On the fall of a middleman's lease, while most of the under tenants were taken into immediate occupation as full tenant-right tenants, instances will frequently be found where, in case of the removal of some of the sub-tenants in order to consolidate the farms, payments were made to the outgoing tenants by the landlord, or by the adjoining tenants who succeeded to their farms.

In all proof of custom or usage it is to be remembered that "it is the fact, and not the mere judgment and opinion of the witness which is receivable in evidence" —(Taylor, *Law of Evidence*, § 1076).

Hearsay evidence, in the shape of ancient documents, historic records, and even of tradition and reputation, is receivable in proof of a custom which is clearly one affecting districts and not merely farms. Taylor says:—

"Hearsay evidence has been admitted when the question related to a right of common existing by immemorial custom, a parochial or other district modus, a manorial custom," &c.—(*Ibid.*, § 548).

The distinction in the matter of evidence between a district modus and a farm modus is well laid down by Phillips:—

"In the case of *Rudd v. Wright*, on a motion for the new trial of an issue from the Court of Exchequer, to try the validity of a modus which was claimed in respect of a district (not being a legal division of the country, as a hundred, parish, vill, or hamlet), Lord Lynd-

hurst was of opinion that evidence of reputation in favour of the modus was properly received on the trial, upon the authority of the case of *Weeks v. Sparks*; the district comprising a great number of farms, extending over more than 2,000 acres, and the questions applying to a great number of persons.

“On questions of farm modus, relating to individual occupiers, and strictly private interests, it should seem that hearsay evidence of reputation in favour of the modus is not receivable. But there has been some difference of opinion on this point. It has generally been understood in the Exchequer that such evidence is inadmissible. In an ancient case it was received, and also in some modern cases”—(*Law of Evidence*, Vol. i., p. 173).

In a previous chapter\* the question has been discussed whether the estate rules are the usages referred to in the first section of the Act. A question closely related has lately been raised whether proof of the tenant-right is to be confined to the estate of which the holding forms a part. Evidence of usage in a district or neighbourhood is proof presumptive of its application to every part thereof, and so is similar evidence on an estate. Such evidence from the estate is no stronger, it may be even weaker, than evidence from the district; as, for instance, in the case of a scattered estate, comprising several townlands not contiguous, proof of the existence of the custom on a distant portion of the estate would afford but slight, if any, presumption of its existence on an isolated and widely-separated farm; whereas proof of the existence of the custom on the estates contiguous to that farm would afford strong presumption that the farm was subject to the custom. The presumption is slight that the tenant knew and therefore contracted with reference to the existence of the custom of the estate; the pre-

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\* Book iii., c. 5.

sumption is strong that he knew, and therefore contracted with silent reference to the custom of the district.

Again, an estate may be so small, and dealings thereon so few, that no legal presumption could be drawn therefrom. "Estates," says Chief Baron Pollock, "may be very large, or very small, and if large, are only accidentally so. It would be impossible to draw any legal distinction between an estate of 100 acres and of 100,000; and there would be *no legal presumption of certainty*, arising from the facts of usage as to terms of letting on a particular estate. *Non constat* that the party becoming tenant for the first time would hear of it"—(*Wormesley v. Dalby*, 26 L. J. [N. S.], Ex. 219).

The strong presumption, which is raised by proof of the existence of the district usage, may be rebutted by showing that the practice of the estate was different, and was either expressly made a part of the contract, or was so well known—so generally and long established at the time of letting, as to be an usage tacitly made a part of the contract.

Unless this obviously just and reasonable rule of evidence be adopted by the Courts, strangely unjust would be the consequences. An estate on which owing to its insignificance or to the fact that the very liberal treatment of the tenants by their landlord rendered sales of their tenant-right unnecessary, would be held exempt from the custom, though all around the custom was respected, and creditors had dealt with the tenants on the faith of its existence.

It is to be remarked that the Act, in dealing with custom, nowhere limits the usage to estates. It does not say the usages *on estates*, though in the provisions applicable to non-customary tenants, this form of expres-

sion is used. Thus, in sec. 5, we find referred to "*the practice on the holding or the estate of which such holding forms a part*;" and in sec. 13, sub-sec. 2, the words occur, "*practice prevalent upon the estate.*"\* The omission of such words in the first section is most significant. It was because in Ulster the custom had been, to use the words of Mr. Gladstone, "established as the fixed and authoritative tradition of the district," "authenticated by a long and wide-spread practice," that it was made "absolutely and in all cases binding upon the landlord." Proof of this fixed and authoritative tradition could not be drawn from the dealings of an individual landlord, or the practice of an individual estate. It will be remembered that section 2 of the Bill, as introduced, proposed to legalize usages outside of Ulster, subject to conditions which were not imposed on the Ulster customary tenants, and which were in Committee struck out of the section. This difference was, in fact, based on the general prevalence of the custom in Ulster; and its random prevalence on particular estates outside Ulster.†

\* Lord Cairns vainly endeavoured to introduce such words into the first section. His amendment was—

"Where such holding, or the estate of which such holding forms a part, is proved to be subject to," &c.

This amendment would clearly have confined the proof to the holding or the estate; but it was rejected by the House.

† In his masterly exposition of the Bill, Mr. Gladstone said:—

"The Ulster custom does not absolutely overspread the whole of Ulster, but it is confined to Ulster. The other customs that prevail outside Ulster form a subject matter more difficult to deal with. Undoubtedly our conclusion is that there is a very large amount of Irish usage by which payment is made from an incoming to an outgoing tenant; in some cases it is made with the consent of *the landlord*

## CHAPTER VII.

## FAIR RENT UNDER THE CUSTOM.

IN the leasing powers clauses of the Land Act it is laid down that in estimating a fair yearly rent—

“It shall not be necessary to take into account against the

*directly ; in some others indirectly ; but it is nowhere, to our knowledge, established as the fixed and authoritative tradition of a district. . .*

We have stopped short of saying that which we propose to say in the case of the Ulster custom, that it shall be made absolutely and in all cases binding upon the landlord, for this reason—that it does not bear with the same unmistakable clearness the character of a virtual covenant *authenticated by a long and wide-spread practice*. We propose that these other customs, where their existence is established, shall be legalized ; but we propose also to subject them to some *restrictions which will not apply to the Ulster custom*. In the first place, the tenant may claim as an absolute right, a customary payment out of Ulster only in cases where he is disturbed in his tenancy by the act of his landlord. In Ulster, I believe, it makes no difference whether a man is a retiring or an evicted tenant. With regard to these customs out of Ulster we propose to limit their binding and absolute operation to cases where the tenant is disturbed by the act of the landlord. We propose that the tenant shall not be allowed to take the benefit of these customs if he is evicted for non-payment of rent. Thirdly, we propose that he shall not have the benefit of the custom if he sublets or subdivides his holding after the passing of the Act, without the consent of the landlord, except it be for a purpose strictly defined in the Bill with regard to cottages and gardens held by the labourers required for the cultivation of the farm—an exception the necessity of which will be obvious. The fourth condition which we attach to the application of these customs is that not only arrears of rent, but damages done by the tenant to the farm may be pleaded by the landlord as a set-off. *And the fifth condition is this—that the landlord may, if he thinks proper, bar the pleading of any such custom if he chooses to give his tenant a lease for not less than 31 years—*(Hansard's *Parliamentary Debates*, Vol. cxcix., p. 369 ; see also *post*, Appendix A).

tenant the increase in the value of the holding arising from any improvements executed by him or his predecessors in title"—(Sec. 28, sub-sec. 3).

In estimating a fair rent under the Ulster custom, account must be taken of the good-will, which is as essential a part of the custom as improvements. We have seen (*ante*, p. 86), that in North Antrim, and the adjoining portions of Londonderry, the system of valuation has been to leave the tenant at the moment of new valuation an interest of 10 years' purchase. That is the minimum of tenant-right interest in that district. The tenants' improvements and the increase in the value of agricultural produce may, within the customary period of settled rent, increase the amount without limit. On the other hand, a fall in the value of agricultural produce, or a rise in the rate of wages, or of profits, may within the same period lower the value of the tenant-right. The customary period of re-valuation generally varies from 20 to 30 years in the different districts of Ulster.

In settling a fair rent, resort must necessarily be had to the custom of the district. On the rent depends the value of the tenant-right. If the customary rent of the estate were a low rent, corresponding with a high tenant-right, the admission of the estate, and the exclusion of the district usage, would make it impossible to raise the rent.

And if the landlord must necessarily appeal to the district usage when he desires to raise the rent, it would be unreasonable for him to disclaim the district usage, when the tenant claims the value of his tenant-right. By admitting the principle of a district usage, equalization of the custom can naturally be brought about.

The usage is, indeed, naturally one of districts. As in the case referred to, one valuator, conducting his valuations on one principle, has settled the rents, and consequently the tenant-right of the various estates of the district. On the very large estates there has generally been an estate valuator; but these estates may very fairly be regarded as districts in themselves; and even these estate valutors have had regard to the rents of the surrounding estates.

The question of fair rent comes under the cognizance of the Land Court, not in every case of a tenant-right claim, but only in cases where before the Act such a consideration was customarily taken into account. It is not competent for the Court to go into this question, unless sanctioned by the custom. Two cases are certainly so sanctioned:—

1. Where the disturbance arises from a demand for increased rent—then the question of fair rent is of the very essence of the inquiry.

2. On the expiration of a lease, in which case there has been customarily a re-valuation.\*

But in the ordinary cases of sale of the tenant-right by a tenant quitting voluntarily, or disturbed because the landlord desired to take the farm into his demesne, or to substitute an unobjectionable for an objectionable tenant, it was not the custom to raise the rent; and consequently the Land Court has in similar cases no right to inquire into the rent. The rent settled between the parties must be assumed to be a fair rent. The ordinary claim of the tenant is to sell subject to the actual rent, or “such fairly valued rent as shall be

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\* See *ante*, bk. i., part 2, chap. 6.



afterwards settled from time to time." The sale is made, the valuation is computed, at the actual rent, but subject to the possibility of future alteration. This is the course under the custom; and it is the customary course which the Land Courts are bound to abide by and enforce.

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## CHAPTER VIII.

### PURCHASE OR ACQUISITION OF THE CUSTOM.

THE second paragraph of the first section sets out a mode of extinguishing the custom. The words are:—

"Where the landlord has purchased or acquired, or shall hereafter purchase or acquire from the tenant the Ulster tenant-right custom to which his holding is subject, such holding shall thenceforth cease to be subject to the Ulster tenant-right custom."

The enactment is retrospective as well as prospective. Retrospectively, it recognizes the existence of the custom, and the possibility of its purchase or acquisition. It will be well to bear this in mind when seeking to interpret the meaning of the enactment.

What is meant by "purchasing," and what by "acquiring the Ulster tenant-right custom?" Mr. Butt severely criticises the language employed. He says:—

"It is loosely and inaccurately worded. Rights secured by custom may be purchased or acquired; and this is what the sentence, no doubt, means, although when rights affecting the estate are bought up by the landlord, they are rather extinguished than acquired. But a custom itself is not a thing capable of being purchased or acquired"—(*Treatise on the Land Act*, p. 312).

The criticism is not altogether just. The language of the paragraph is not so much inaccurate as non-

technical and popular. The Act over and over again uses popular and not technical language; and this may be objectionable on the ground that it throws considerable difficulty in the way of an *a priori* interpretation of its meaning, by reference to established authorities and general analogies. But whether this objection be well-founded or not, the Act must be taken as it is, and its popular and non-technical language must be interpreted as such. The objection loses much of its force in the case of the Ulster custom. The Legislature studiously avoided the slightest approach at definition—definition which, in the absence of exact knowledge of its various incidents, might have been limitation or restriction not founded on facts, or warranted by the nature of the custom. The custom had for centuries been popularly treated and acted upon. It was not recognized in the courts, and consequently no well-settled nomenclature, no precise phraseology had adapted itself to its peculiarities. To draw from other subjects of law their precise language, and apply it to this region of custom, novel and unexplored by lawyers, would have been simply a misuse of language. It would have been contradictory of the intention to legalize the custom as it existed in fact. Names are but the symbols of notions; and names which had a meaning steadily fixed and exactly determined with reference to the legal notions heretofore current, could but unfitly be used with the same precision to designate the notions of the custom—a custom in many respects at variance with the maxims of the law and the ideas of lawyers.

A strict nomenclature logically involves precise definition. But “the business of definition is part of the business of discovery . . . definition is the last

stage in the progress of knowledge" (Whewell, *Nov. Org. Renov.*, p. 39). The Legislature, dealing with the custom of Ulster, did not define: it logically follows that it could not, and did not, as indeed is plain, use technical language.\*

Mr. Butt points out many analogies between the English copyhold and the Ulster tenant-right. But he fails, as every one must who deals with facts, to identify them. The Ulster custom is *sui generis*. With many features of resemblance to copyhold tenure, to the tenant-right of renewal, and to the modern tenant-right of English agriculture, it yet stands distinguishable from each and all of them. There is, therefore, peculiar danger in arguing from analogy between the Ulster custom and any of the English forms of custom. "The argument from analogy is at best only admissible as an inconclusive presumption, where real proof is unattainable" (Mill, *System of Logic*, bk. v., ch. 5, § 6).. To

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\* The danger of strictly applying old names to new ideas is well illustrated by Mr. Mill. "The first English conquerors of Bengal carried with them the phrase 'landed proprietor' into a country where the rights of individuals over the soil were extremely different in degree, and even in nature, from those recognized in England. Applying the term with all its English associations in such a state of things, to one who had only a limited right they gave an absolute right; from another, because he had not an absolute right, they took away all right, drove whole classes of people to ruin and despair, filled the country with banditti, created a feeling that nothing was secure, and produced, with the best intentions, a disorganization of society which had not been produced in that country by the most ruthless of its barbarian invaders"—(*System of Logic*, bk. iv., c. 5, § 3). The appositeness of this illustration to our present subject will not be disputed. In legalizing the Ulster custom, the Legislature, by leaving the definition and the nomenclature to be settled according to the facts, wisely avoided the danger which Mr. Mill's remarks suggest.

make Mr. Butt's argument from the analogy of the copyhold tenure conclusive that a surrender of the tenancy is an extinguishment of the custom, there should be an exact parallelism between the copyhold tenure and the Ulster tenant-right—and not merely this, but an impossibility of real proof.

Both these conditions are wanting. There is not—at all events there is no warrant for assuming that there is—exact parallelism between the custom and the copyhold. And there is no difficulty in proving, as a matter of fact, the effect of a surrender on the custom. Had the words “*has purchased or acquired*” been omitted, thus confining the legislation of the paragraph to future transactions, there would have been more reason for a resort to analogies.

Under the facts of the custom the surrender of the tenancy has not generally, if it has ever, operated to extinguish the custom for all time thereafter. Tenancies again and again have been surrendered, but the custom has grown up afresh. In the period of agricultural distress which followed the fall of the war-prices, tenancies were frequently surrendered without sale or compensation, because at the old rents the tenant-right was worthless. Leases were frequently surrendered to obtain a reduction of rent, for the very purpose of keeping existent the tenant-right interest. Without the surrender and the reduction the tenant-right would have been lost. Often a new tenant took the old one's place, who had surrendered for the purpose of emigration, when, owing to the fall of prices, the tenant-right was worthless, and the incomer has dealt, when better times came, with the tenant-right as freely as the tenant who never surrendered. In the famine times surrenders

were very frequent. It is questionable if three-fourths of the lands of Ulster, at the present moment confessedly subject to the custom, have not at one time or another been surrendered by the tenant.

If, then, as is clear from the first paragraph, the Legislature intended to give full effect to the custom in its entirety, language used in subsequent portions of the Act should be quite unambiguous to restrict or modify this intention. Is the language of the second paragraph such? Is a mere surrender of the tenancy so clearly a purchase or acquisition of the custom that it must be held to be such, though the effect should be to destroy the tenant-right, fully legalized by the preceding paragraph, in three-fourths of the farms in Ulster? The words "Purchase of the custom," in their popular or ordinary sense, are plainly and fairly applicable to a transaction in which money passes from the landlord to the tenant in consideration of the latter expressly foregoing his claim to the benefit of the tenant-right custom. Such a transaction is quite separate from a dealing with the tenancy. The tenant may sell, and the landlord purchase the custom, while the tenant continues in occupation under his tenancy.\* If afterwards

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\* Mr. Gladstone thus expounded this provision :—"Where a landlord has by a deliberate arrangement in the nature of purchase with the occupier of the farm, abrogated the Ulster custom, then it shall not be pleaded against him, but the land shall fall within the general scope of these provisions of the Bill which will be applicable to land tenures apart from custom."—*Hansard, Parliamentary Debates*, Vol. cxcix., p. 367).

The words "or acquired" and "or acquire" were added in the Lords.

The history of this amendment is this :—

Lord Cairns moved an amendment [after "purchase" — "or where the tenant of the holding has given up, or shall hereafter give up possession to his landlord for valuable consideration"] "providing for cases

quitting, the tenant may claim compensation under the general provisions of the Act; and in such a case sec. 18 expressly directs the Court to take into account "any moneys paid by the landlord to the tenant on

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where the tenant-right had been bought up by the landlord by a remission of rent or other valuable consideration. Tenants with several years' rent in arrear, and desirous of emigrating, sometimes gave up their farms on the rent being remitted, and a small sum given to them. He thought such cases would not come within the proviso relating to purchase of the custom"—(*Hansard*, Vol. ccii., p. 746).

Lord Chelmsford suggested that the object of the amendment would be attained by inserting the words "or acquired"—(*Ibid.*)

In Committee of the Commons Dr. Ball had moved the following amendment:—

"Where a tenant or his predecessor in title has within ten years before the passing of the Act taken, or where a tenant shall hereafter take a holding directly from his landlord, without having given to any outgoing tenant any valuable consideration for the same, such holding shall thenceforth cease to be subject to the Ulster tenant-right custom."

Mr. Dowse opposed the amendment on the ground that "a tenant might get a farm from his landlord without giving the previous tenant any valuable consideration; but still the new tenant might hold the land subject to tenant-right."

Sir Fred. W. Heygate said he agreed with the Solicitor-General. If the amendment was agreed to, it would have the effect, in a great number of cases, of doing away with the Ulster custom altogether. Not one tenant in fifty had ever paid actual money for his tenant-right.

On hearing this, Dr. Ball withdrew his amendment, which he stated he had introduced at the suggestion of various gentlemen connected with Ulster.

Mr. Bruen's amendment followed:—

"When it is proved that a tenant or his predecessor in title holds, or when a tenant shall hereafter take his holding directly from the landlord, without having given any purchase-money or other valuable consideration for the same, such holdings shall not be deemed to be subject to the Ulster tenant-right custom."

This amendment was negatived without a division—(*Hansard*, Vol. cc., p. 1014).

account of the purchase of the right of the tenant under the Ulster tenant-right custom."

If this is the plain meaning of "purchase," what sense is to be attached to "acquire?" Purchase, in its legal or ordinary sense, is only a mode of acquiring. If "acquire" is to be taken in its most comprehensive sense—to signify every mode in which the property of one person becomes the property of another—and this not merely expressly, but also by implication of law—we may well ask why the word "purchase" is used at all? And why should the more follow the less comprehensive term?

Clearly, if we give natural construction to the language, "acquiring" and "purchasing" must be taken to be things *ejusdem generis*. And there is a popular sense of the former which fulfils this condition. Whilst to "purchase" is to give *money* for the custom, "acquire" is to give *money's worth*. Sec. 7, which bears so close a resemblance to the Ulster tenant-right, speaks of "money paid or money's worth given" by an incoming to an outgoing tenant. Sec. 18, which refers only to *purchase*, speaks only of "*moneys* paid:" there is no reference to *acquiring* or *money's worth*. "Acquiring," or giving money's worth, would cover transactions, where in express consideration of his tenants' foregoing the benefit of the custom, a landlord reduces the rent, or forgives arrears of rent. But this leaves no place for what are not real transactions of purchase or acquisition; but are transactions which by legal implication merely can be understood to be such—for instance, acceptance of a lease, or surrender of a tenancy in bad times—transactions which by no straining of ordinary language could be called purchase or acquisition, and which, as a matter

of fact, have never been deemed to extinguish the custom.

And if any doubt existed in the matter, the policy of the statute is to be remembered. It legalizes, in the interest of the tenant, a custom of old date. Its policy is to protect the tenant who has dealt with his farm on the faith of the custom in the future enjoyment of its full benefits. A remedial statute should be construed so as to promote the beneficial end in view, and to prevent the failure of the remedy. The principle of *Baspool v. Long* (*ante*, p. 143), is also to be kept in mind, that "whatever goes in deprivation or bar of a customary estate is to be construed strictly."

There may be, and no doubt are, many leases in which the tenant-right has been expressly purchased or acquired; there may be, and probably are, a few yearly tenancies under which similar transactions have taken place; and it is to these that the words of the second paragraph are properly applicable. Where they have been entered into before or after the Act, the holding shall thenceforth "cease to be subject to the Ulster tenant-right custom."

It will be observed, that in the other case of extinguishment mentioned in the section, *viz.*, where a tenant under the custom claims and obtains compensation under the general provisions of the Act, the words are different—"such holding shall never again be subject to the Ulster tenant-right custom." A similar distinction is kept up in section 2. If we are to interpret differently what is plainly a designed difference in the enacting language, the expression "cease to be subject" may fairly be considered to mean "cease to be subject in the hands of the tenant selling or parting with



his tenant-right;" whilst in the case of compensation awarded to an Ulster tenant claiming the option, not even in the hands of a future occupant, could the lands *ever again*, unless by re-imposition, be subjected to the custom.

That the meaning of the words "purchase" and "acquire" is as we have suggested, will appear if we consider the import of the words "from the tenant." Does purchase from the tenant mean purchase from the tenant continuing as tenant after the purchase, or does it extend to transactions of purchase from a tenant ceasing to be such? If the latter is meant, it is hard to see what was the object of introducing the words "from the tenant;" for, as the tenant-right is the tenant's property, from him only could it be purchased. There can be hardly a doubt that the former meaning is that intended by the legislature; and that the transactions to which it was intended to apply, were instances of purchase by paying money, or acquiring by giving money's worth to a tenant continuing in occupation, with the object of debarring him or his successor in title from ever thereafter claiming the benefit of the custom.

It is no answer to this view to point out that "holding" means "farm"—"not the tenure, but the subject matter of the tenure" (*per* Fitzgerald, J., in *Hill v. Earl of Antrim*, author's *Guide to the Land Act*, p. 284). This is true; but it in no way affects the argument. It would not even be an answer to an argument that the extinguishment was limited to the tenancy existing at the time of purchase—an argument which is certainly maintainable. But if the extinguishment is intended to extend beyond the title of the tenant who has sold or

parted with the custom to which his farm is subject; if it extends to that same farm in any future hands, unless the landlord has allowed the custom to re-attach itself, then the fact that "holding" means "farm" is part of the argument.

The custom may re-attach, though no language was used in the new letting expressly re-imposing the custom. For the custom is now, and retrospectively has been declared a local law, incorporating itself with every contract of tenancy from which it is not excluded. The circumstances of the letting may as certainly as express words imply subjection to the custom. The circumstance that all the surrounding farms are subject to the custom, would in the absence of express exclusion of the custom or of special circumstances in the letting inconsistent with its existence, be proof that the custom was intended to re-attach.

## APPENDICES.



## APPENDIX A.

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### ESTATE RULES AND LEGAL USAGES.

Mr. Gladstone, in closing the debate on the second reading, said:—

“The right hon. gentleman [Mr. Disraeli] says that our legislation, with regard to the Ulster custom, legalizes the private arrangements on every estate in the north. There cannot be a greater or more fundamental misconception of the whole matter. *The Ulster custom is not a private rule that each man chooses at any time to establish. A breach of custom is not a custom. An established custom is a thing well understood as such, and perfectly capable of receiving a legal meaning and interpretation, when it is investigated as a matter of fact. Wherever a particular proprietor, or an agent, chooses to set up a rule which, though it be enforced on the estate, is in derogation of custom, and which has not in itself subsisted so far as to acquire the character of a custom, it is condemned as a private and arbitrary practice, and is over-ridden by the custom, the authority of which will be exerted and enforced against it*”—(Hansard, *Parliamentary Debates*, Vol. cxcix., p. 1839).

In the debate on Dr. Ball's amendment, the portion of which substituting “usages” for “usage” was accepted by the Government, the Solicitor-General for Ireland [Mr. Dowse] said:—

“The Ulster custom varied in different districts—in no two counties had it the same incidents”—(Hansard, Vol. cc., p. 779).

Sir Roundell Palmer said:—

“If they retained the singular, only *one custom* might be contemplated by the Act, and this might lead to considerable difficulty if a case were carried into court”—(*Ibid.*)

Mr. Jessel [afterwards Solicitor-General] said:—

“Wherever in England sufficient evidence has been given of an usage being established for a reasonable length of time, throughout

a sufficiently extensive *district* of country, the judges had decided that that was a legal custom, and a custom of the country. What the Government intended to do was to rectify what was considered a miscarriage on the part of the law in Ireland—or rather of the administrators of the law—and to give an equal legal sanction to customs or *usages of the same character* existing in Ireland ”—(*Ibid.*)

## APPENDIX B.

### DEPRECIATION OF IRISH CURRENCY 1798–1820.

Table of the Depreciation of Gold in England from 1800 to 1821.  
(From Tooke's *History of Prices*, Vol. ii., p. 379.)

Years	Average Depreciation per cent.	Years	Average Depreciation per cent.
	£ s. d.		£ s. d.
1800	...	1811	7 16 10
1801	8 7 8	1812	20 14 9
1802	7 5 10	1813	22 18 0
1803	2 13 2	1814	25 2 6
1804	2 13 2	1815	16 14 3
1805	2 13 2	1816	16 14 3
1806	2 13 2	1817	2 13 2
1807	2 13 2	1818	2 13 2
1808	2 13 2	1819	4 9 0
1809	2 13 2	1820	2 12 0
1810	13 9 6	1821	...

A good harvest and more free importation produced a fall in corn in 1813–14. Farmers were ruined, and in 1814–16, 240 banks in Great Britain stopped payment, and 89 commissions of bankruptcy were issued against them. It was the contraction of the currency forced by the failure of so many banks of issue, which in 1817 restored the currency to almost its natural state.

In Ireland, the depreciation began earlier, and reached a much greater height. There are two tests of depreciation—(1) the course of exchange, and (2) the price of bullion, as calculated in the depreciated currency. In the state of the exchanges between Ireland and England, we have an index of the relative depreciation of the currency in the two countries. It is to be remembered that at that time, ever since 1688, when the nominal value of the Irish shilling was raised from 12d. to 13d., so that £108 6s. 8d. Irish money became equal to only £100 of British money—the exchange was at par when it was  $8\frac{1}{2}$  per cent. against Dublin. By whatever amount then the exchanges with London rose above this point, was the Irish currency depreciated as compared with the English. Sir Henry Parnell in his work on *the Currency of Ireland*, Dubl., 1804, gives a table of the course of exchange between Dublin and London, from which I have compiled the following yearly averages :—

Year	Average course of Exchanges between Dublin and London	Average depreciation of Irish currency per cent. as compared with English	Depreciation of English	Total Depreciation of Irish currency
1798	9	$\frac{2}{3}$	...	$\frac{2}{3}$
1799	$11\frac{1}{4}$	$3\frac{1}{2}$	...	$3\frac{1}{2}$
1800	$11\frac{1}{2}$	$3\frac{1}{6}$	...	$3\frac{1}{6}$
1801	$13\frac{1}{4}$	$5\frac{1}{2}$	$8\frac{1}{2}$	$13\frac{1}{2}$
1802	12	$3\frac{1}{3}$	$7\frac{1}{4}$	11
1803	$14\frac{1}{2}$	6	$2\frac{2}{3}$	$8\frac{2}{3}$

It will thus be seen that in the early years of the period, the depreciation was much greater than in Ireland. There were in 1804, no less than 50 Banks of Issue in Ireland, nearly all of which failed in the trying years of 1815 and 1816. The depreciation in Ireland followed a similar course to that in England ; and was corrected in a similar way.

## APPENDIX C.

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### BENEFITS OF TENANT-RIGHT.

The following extract from the evidence of one of the most experienced and intelligent land agents in Ulster, admirably sums up the social and economical benefits of tenant-right. It is satisfactory to know that 30 years' further experience of the working of the system has only confirmed that gentleman in the opinions he expressed before the Devon Commission; and we have seen (*ante*, p. 106), that tenant-right has proved as acceptable to the landlord (Lord Lurgan), as to the agent (Mr. Hancock):—

“I consider tenant-right beneficial to the community, because it establishes a security in the possession of land, and leads to the improvement of the estate, without any expenditure of capital on the part of the landlord. It likewise affords the best security for his rent, as arrears are always allowed to be deducted from the amount the occupier receives for tenant-right. It is very conducive to the peace of the country, for almost every man has a stake in the community, and is, therefore, opposed to agrarian outrages as well as riots. The laws are more respected; there are none of those reckless, daring men who are ready for any deed, under the consciousness that their situation cannot be worse; the liberty of the subject is more respected; and imprisonment has greater terrors, from the fact that almost any tenant can procure bail for his future appearance in court or his future good behaviour. There is never any instance of forfeited recognizance. An arrest is, therefore, a much more serious matter in this than in other parts of Ireland; for, as there is less risk (from his stake) of the offender flying, so here the degradation is more keenly felt, and parties often subscribe and bring actions against magistrates for false arrest and imprisonment; whereas, where no tenant-right exists, the first step



is the arrest, to prevent escape, and, secondly, the consideration of the cause. Imprisonment and contamination with bad characters are thus more frequent. The magistrates cannot have the same respect for the liberty of the subject; and, when acts of oppression occur, revenge is taken, not by an appeal to the civil court for damages, but by combination and an appeal to force, waylaying, and murder. The necessity of distress for rent, a fruitful source of riots and broken heads, is also obviated by the tenant-right, as there is no danger of loss of arrears. The disallowance of tenant-right, so far as I know, is always attended with outrage. A landlord cannot even resume possession to himself without paying it. In fact, it is one of the sacred rights of the country, which cannot be touched with impunity; and, if systematic efforts were made amongst the proprietors of Ulster to invade tenant-right, I do not believe there is force at the disposal of the Horse Guards sufficient to keep the peace of the province; and when we consider that all the improvements have been effected at the expense of the tenant, it is perfectly right that this tenant-right should exist: his money has been laid out on the faith of compensation in that shape. I think it also affords facilities for the introduction of a better class of farmers, and tends to consolidation, because portions of land can be purchased, and large farms made, without disturbing the good will of the community"—(*Evidence of John Hancock, Esq., J.P., Agent of Lord Lurgan*).

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## APPENDIX D.

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### MASTER FITZGIBBON'S ACCOUNT OF TENANT-RIGHT.

"Tenant-right is not so visionary, or so difficult to understand [as fixity of tenure], because it is said to have, and has, a real and long established existence in Ulster.

"In the spring of 1847, I was counsel for the Dublin and Belfast Junction Railway Company on the inquiries in Ulster for valuing

the land required for the undertaking. Much discussion took place upon the subject of tenant-right, when set up as an interest in the land for which the occupier claimed distinct compensation. *Every tenant who had a terminable lease, or held from year to year, in addition to the value of the tenancy, set up a claim to so many years' purchase of the value of the land itself; and this he claimed, not only over and above and in addition to the value of his legal tenancy, but also without professing in the least to diminish the claim of the landlord for the full value of his reversion, expectant upon the actual tenancy, estimated according to its legal duration, irrespective of tenant-right.* . . .

"It was impossible to deny that tenant-right had some meaning and practical effect in several counties in Ulster; and what that precise meaning and effect was no one could explain, further than to assert that the tenant could get money for it. However, I learned very lately the nature of it from a single case which had occurred to a respectable tenant (whom I happened to know), whose lease had expired a few years before. His landlord refused to renew the lease, or allow him to hold on as yearly tenant, and altogether repudiated the claim of tenant-right as groundless in point of law. The tenant being advised by counsel that he had not a legal right to overhold the farm, gave it up on the expiration of the lease. He had succeeded his father, who had been for many years the tenant in possession of this farm; and turning him out was a clear and strong repudiation of the favourite notion of tenant-right. However, he left quite peaceably, and took another farm. In six or eight months after so quitting, the landlord offered to give him a new lease of his farm at the old rent. The tenant answered that he had taken another farm; but added that if the landlord would give him a new lease, and allow him to sell his interest under it, he would accept it, and be thankful. The landlord consented; and within a month the tenant sold the new interest under the lease for £500. This fact may be relied on : . . the law of opinion alone operated on the landlord, and vindicated its power, when the common law was imbecile to protect the old tenant"—(*Ireland in 1868*, by G. Fitzgibbon, Receiver Master in Chancery; London, 1868).

## APPENDIX E.

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The following interesting communication from one of the most experienced and able surveyors and valuers in Ulster—Mr. Robert Macartney, Ballycastle, co. Antrim—owing to that gentleman's conscientious desire to make the information as trustworthy as possible, arrived too late to be inserted in its proper place, in the chapter on Valuation, but is too valuable to be omitted in this work :—

### LEASING.

“The leasing custom of the north of Ireland in general, for at least one century back, appears evident from old leases, some of which are still in existence, to be 31 years certain, and the longest of three lives named in the lease. At the termination of those old leases it was customary to survey, value, exchange land, straighten boundaries (especially where rundale existed), giving quantity for quantity where practicable, or else a money compensation, generally awarded by two men or the surveyor. All this being done, a lease was generally given for 31 years certain, without lives, to the former lessee or his representatives. This might be said to be the leasing practice of from 30 to 40 years back. When old leases fell more recently, seldom more than 21 years' leases certain, without lives, were given; and later still, say for these last 10 or 20 years, very few leases were granted at all upon most estates.

### DISTURBANCE.

“At the fall of leases, the former lessee or his representatives were invariably returned as tenants at a new valuation, without exception, where the tenant was deemed solvent. But where a tenant was not deemed solvent, or where a farm had been divided among a number of claimants, or where claimants were old, infirm, and destitute of means or relations to assist in labouring the farm, they were seldom retained as tenants, but were always compensated according to the value of their holding and the tenant-right of the times. Old people who were not liable to hold on were often pensioned off for life with freehold, garden, field, &c.

## VALUATIONS.

“When the general valuation of an estate takes place, the leased farms are included, in order to complete the total valuation of the estate. But where leased farms fall out immediately, or at any reasonable time after, say from five to seven years after the general valuation of the estate has been made, the late or general valuation is mostly adopted. In the north of the counties of Antrim and Londonderry, where land is fairly laboured, fences, drains, farm roads, houses, &c., in fair medium condition, the average letting value ranges from 20 to 25 per cent. above the Government valuation; and at that scale of valuation the tenant-right interest sells for about an average of 10 years’ purchase of the new valuation or fair rent. Some sales, however, have gone higher, where free liberty was given to sell, and where houses and land were in good condition. At Ballymena Land Sessions, Spring, 1872, in the cases of *Thompson* and *Richards* who claimed compensation against *A. Hamilton*, the Government valuation in Thompson’s case being £28, the new valuation being £35 15s. 6d., the Chairman considered £35 to be a fair letting value, being equal to 25 per cent. above the Government valuation, and fixed compensation at £350, equal to ten years’ purchase on the fixed rent. In *Richards’* case the Government valuation being £29, and the new valuation £37, the Chairman fixed the annual rent at £36, and compensation at £360, equal to ten years’ purchase on the fixed rent. Upon some estates, even before the passing of the Land Act, compensation had been fixed at ten years’ purchase upon the then or present rent. So that it is likely that ten years’ purchase on a fair rent will become the standard value of the Ulster custom in Court, especially in the county Antrim.” \*

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\* The ten years’ purchase at the moment of the new valuation, and before any improvements have been made by the tenant under the new letting, marks the minimum of tenant-right compensation in the district. It is the value of the good-will, and corresponds with the compensation for disturbance of the 3rd sec. It is ten years all through—not a varying scale from one to seven years’ rent. Before the next customary period of re-valuation, the tenant may increase the ten years’ to any number of years’ purchase, for there can be no limit to possible improvement.—[NOTE by the EDITOR.]

DECISIONS.



# DECISION

OF

## COURT FOR LAND CASES RESERVED.

### HOLT v. HARBERTON.\*

*A tenant under a lease cannot register under sec. 6, and therefore cannot claim for improvements which were made prior to the lease, at a time when the tenant held only a portion of these lands, and where the farm had been increased and the rent diminished under the new lease in consideration of those improvements.†*

LORD O'HAGAN, L.C.—This case comes before us upon certain questions reserved by the Lord Chief Justice, at the Kildare Summer Assizes of 1871, for the consideration of this Court. They arose in this way:—A claim to register improvements under the 6th section of the Land Act was lodged by the appellant, and disputed by the respondent, and was the subject of adjudication by the learned Chairman of the County of Kildare. The claim was large, and comprised many items; but that as to which the main controversy arose regarded a dwelling house built by the appellant in 1844. It appeared in evidence, that John Holt, the elder, had held the lands on which that house was built as tenant to Lord Harberton. 364a. 2r. 23p. of those lands were held by him from year to year. In the year 1844, a lease was executed comprising the lands so held, and in addition, 91a. 3r. 23p. of which John Holt had not previously

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\* Before the Lord Chancellor, Lord Chief Justice, the Master of the Rolls, the Lord Chief Baron, the Vice-Chancellor, O'Brien, J., Hughes, B., Fitzgerald, J., Deasy, B., Morris, J., and Lawson, J. (8, 9 Jan., 1872, 6 IR. L. T. REP. 1 I. R., 1 REG. & L. A., 82).

† It will be observed that this case was decided on its special circumstances; and is not, as has been stated, a decision that a tenant cannot in any case go behind a lease to claim for improvements. So, too, *Darragh v. Murdock* (reported in the author's *Land Act*, p. 281), was decided on special circumstances, the learned judge expressly stating that a lease differing only in mere increase of rent from the previous letting would raise a quite different question.

been in possession. By that lease the rent for the entire premises was less than that which had been previously paid ; and it was proved and assumed in the case that the increase of the land and the diminution of the rent were made by the landlord in consideration of the tenant's large expenditure, in the year 1842, upon the house and premises, the registry of which, for the purposes of compensation under the Act, is the matter now in dispute.

In this state of facts, the learned Chairman, whilst he authorized the registry of many other improvements, to a very large amount, made after the execution of the lease of 1844, refused to admit the claim as to the house built before it ; and his decision, in that respect, was approved, upon appeal, by the Lord Chief Justice, who reserved the question—"Whether the existing lease of October, 1844, is the terminus from which the improvements claimed by the appellant are to be allowed or disallowed ?" And the further question—"Whether the cost price or money value of the improvements claimed by the appellant should be stated or included in the schedule of improvements settled by the Chairman ?" On the second of these questions we are not required to give any opinion, as Mr. Butt has abandoned at the Bar the controversy which it represented in the Court below ; and we have simply and singly to consider whether the lease of 1844 is the terminus from which the registry of improvements shall have its beginning ?

Two things are plain—first, that when the house was built, the tenant had not any legal right to compensation ; and, secondly, that the lease of 1844 worked a surrender by operation of law of the antecedent tenancy, estopping the lessee who accepted it from denial of the lessor's right to make it, and giving him a title changed, in all respects, as to the quantity of his land, the rent to be paid by him, and the conditions of his tenancy. The lessee entered, and after some years' enjoyment of the premises, died intestate. His interest under the lease is now vested in the appellant. This being so, the question is whether, under the 6th section of the Land Act, it is possible to allow the claimant to register the house as an improvement ? We are all of opinion that it is not. That section provides that "any landlord or tenant who may be desirous of preserving evidence of any improvements made by himself or his predecessors in title, before or after the passing of this Act, may at any time (subject to the provisions hereinafter contained), file a schedule in the Landed Estates' Court specifying such improvements, and claiming the same as made by him or his predecessors in title, and such schedule so filed shall be *prima facie* evidence that such improvements were made as therein mentioned." Now, in the case before us, the improvement of which the tenant desires to preserve evidence was confessedly not



made by himself; and he can only succeed if it was made by "his predecessors in title." But the title under which he claims is the title under the lease of 1844. All former title to the lands and the improvements upon them was surrendered and done away with by the acceptance of that lease, and there is no other title to which he can be deemed a successor, but the title under it. Before 1844, his father held other premises at another rent, on another tenure; his title to them did not and could not devolve on his son, because it was destroyed. What did devolve to the appellant was the new title substituted for the old under the lease, and we cannot go behind it and declare him to have succeeded to a title which was so extinguished.

We desire to confine our judgment to the precise question before us, and the exact circumstances with which we have to deal; and we think it better to avoid the discussion of ingenious analogies and imaginary cases which have been produced in the argument at the Bar. The judgment of the Lord Chief Justice must therefore be affirmed.

PIGOT, C.B.—I wish to add a few words to the judgment of the Lord Chancellor, in which I concur, and I rest my judgment, mainly, upon the transactions that occurred when the new lease was obtained. I apprehend we are entitled to look to that transaction, because we are called upon to ascertain what was the subject matter of the lease of 1844. There were two portions of land included, one of which had not been previously demised, and the other which had the lesser rent was part of the bargain then made, and it appears to me that the transaction precludes the lessee from contending that he was the predecessor in title to any who succeeded him, except in reference to what was comprised in the new lease. I say this because I consider that some of the phrases used in the sections are far from being clear or satisfactory—they are singular—and I am not at liberty to speculate upon, or determine anything with a view to ascertain the intention of the legislature; but I am to take that which has been expressed, and it is singular, when the legislature describes by whom the improvements are to be made, in order to give a right to compensation under the 4th section and a right to registry under the 6th, they treat the person claiming, the tenant at the time, as the person who is to have compensation for all improvements upon his holding made by him or his predecessor in title. Whether we are at liberty to import into the Act the phrases "him at a time he holds what he holds when he made the claim"—"the predecessor in title when the claim was made"—or "at any time"—I do not consider myself bound to say. I am satisfied that the transaction of 1844 created a perfectly new relation, and gave rise to a perfectly

new matter, and precludes the person who takes the lease from treating himself or his successor, as having been anything but a person who took a new lease of new premises with a perfectly new and distinct relation, though in the case of the same tenant under the same landlord. Upon these grounds I entirely concur in the judgment that has been pronounced by the Lord Chancellor.

WHITESIDE, C.J.—The case was tried by me, and before I made the order referring it to this Court, I wished to confer with my colleague, Baron Fitzgerald. I had no doubt whatever about the law or justice of the matter. I heard Mr. Hamilton give his evidence. He stated that the late Mr. Holt had expended some money upon the premises. He, as agent of the estate, saw how the matter stood; and he agreed to give Mr. Holt a new lease of some land. Mr. Holt said he required about 100 additional acres of land, and Mr. Hamilton replied that he would endeavour to procure the lease from Lord Harborton; and he (Lord Harborton) considering that Mr. Holt was entitled to compensation for having erected the dwelling-house, agreed to give the lease of 1844. He has held it at a reduced rent, and may still continue to do so, as the life is in existence.

PIGOT, C.B.—We may take it as assumed that the new lease was granted in consideration of the circumstance that the dwelling-house had been erected.

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## JUDGES' DECISIONS.

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WILLIAM JOHNSTON AND JAMES JOHNSTON, Appellants; SARAH PATTON, Respondent.\*

*A landlord is bound to pay under the custom what a solvent tenant would give—Deterioration is not a subject of set-off under the custom, but may properly be regarded in estimating the bona fides of the valuation of the tenant-right.*

William and James Johnston were the respondents in the Court below. It appeared that they had purchased a portion of Lord Belmore's estate, in the Landed Estates' Court, in the year 1853. The lands so purchased comprised the farm of the claimant, Sarah Patton, who was the widow of Samuel Patton. Samuel had

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\* Land Appeal, Omagh Summer Assizes, 1872; before Monahan, C.J., 5 IR. L. T. REP. 159.

occupied a farm, the rent of which was £63 14s. 8d., and his widow held a portion of that farm after his death, at the rent of £36 12s. 4d. The portion which the widow held consisted of about 42 acres, statute measure, and the Government valuation for same was £29 10s.

A notice to quit had been served on Sarah Patton on the 23rd March, 1870, and a civil bill process of ejectment was brought under that notice. Sarah Patton then claimed under sec. 1 of the Land Act, 1870.

*Holmes*, who appeared for the Messrs. Johnston, said that he appealed on two grounds. First, that there was no evidence of Ulster tenant-right existing on these lands, which were part of the Dromore estate. Evidence had been given of the existence of such a custom on Lord Belmore's other estates, but not on that one. Secondly, that the amount given was calculated on the basis of evidence of what a purchaser said he would give for the value of the tenant-right. A man came into Court and said he would have given so much, which could not be refuted. The respondents in the Court below wished to prove that the lands had been badly managed, so as to reduce the amount, but the chairman said that he could not entertain evidence of that description at all. Counsel insisted that the decree should be set aside on these grounds. He did not raise any question on the effect of the Landed Estates' Court conveyance.

Mr. Coulson said that he was agent to Lord Belmore, under Mr. Paul Dane, and he proved that it had been the custom for tenants of that estate to sell their tenant-right, subject to the approval in the office of the new tenant; also, that the tenant-right was often sold by public auction.

On cross-examination, witness stated that Lord Belmore, when he came of age in 1856, made a new rule, restricting the money to be paid for tenant-right to £8 per acre, but he said the tenants did not abide by that rule, but paid more privately in many cases.

Mr. Mackay, the sub-sheriff of the county, corroborated the last witness as to the existence of the custom.

W. J. Robinson deposed that he knew the farm well, and that he had offered £300 for the tenant-right, and was ready to pay that sum. He had another farm now, and did not want to add to it.

The CHIEF JUSTICE said the question was—What would a respectable solvent man, wishing for this farm, be prepared to pay for it? The custom proved was that the landlord allowed to sell, subject to his approval. The Act made that custom enforceable, and made it necessary that the landlord should approve if the Court thought there was no reasonable ground for objecting to the new tenant. His lordship did not think the state of the farm of much importance.

Two farmers, named Grimes and Coulter, corroborated the other witnesses as to the value of the tenant-right.

*Holmes* submitted to the Court that where a landlord is taking up lands into his own hands, he ought not to be called upon to pay such a fancy price as would be paid by an adjoining farmer, or by some one who had a particular desire for that piece of land. The proper amount to be paid would be what an ordinary farmer, wanting such a farm, would fairly be ready to pay for it.

The CHIEF JUSTICE—That is exactly the amount that I wish to ascertain.

*Holmes* insisted that the two witnesses who had actually offered to buy at that price had peculiar reasons for paying an exaggerated sum. The 18th section showed that in calculating the amount to be paid by the landlord, the actual state of the farm should be taken into account. Under that section the Court was to take into account any default of either party. Bad farming or allowing the premises to get out of repair would be circumstances that should be considered against the tenant. Counsel therefore would adduce some evidence to show that the farm was neglected.

MONAHAN, C.J., in giving judgment, said—He saw no reason why he should not affirm the decree. There was no doubt whatever on the first point that the custom did exist. His lordship said that Mr. *Holmes* was perfectly right in not raising the question of the effect of the Landed Estates' Court conveyance. He had no doubt whatever that the conveyance had no such effect as to do away with the custom, which had been made enforceable at law by the new Land Act. There was no real reason why any of those men, who were willing to pay the £300 for the farm, should not be accepted by the landlord, except this—either that the landlord wished to keep the farm in his own hands, or to give it to his son or nephew or some relative. If he wished to do that, he must pay what a respectable and solvent tenant would be willing to pay. His lordship did not say that he would not take into consideration the state of

the farm, and if bad farming and things of that kind had been proved it might have had an effect upon him ; or if he had found people swearing that they would give £300 for a farm which they knew to be in a wretched state of cultivation, and quite ruined, he would not believe them. Having heard all the circumstances, he would affirm the decree of the Chairman.

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EARL OF CHARLEMONT *v.* JOHN DEVLIN.\*

*To entitle a claimant to the benefit of the Ulster Tenant-right Custom it is not necessary that he should have been legally a tenant at the time of the passing of the Landlord and Tenant Act, 1870. What was permitted by usage before the Act can now be enforced under the Land Act.*

A notice to quit had been served on Devlin in April, 1869, and a notice to give up possession in November, 1869. An ejectment decree was made by the Chairman on the 12th of January, 1870, and two days before the expiration of that decree, *i.e.*, on the 10th of January, 1871, the decree was executed. The tenant had been suffered to remain in possession until that date. The Land Act, 1870, received the Royal assent on the 1st August, 1870. There was no dispute about the existence of the tenant-right custom, which was admitted, and it was proved that the custom on the estate had been that where a tenancy had been determined the tenant was allowed to sell his tenant-right.

*Hamilton, Q.C., and Holmes, for the appellant.* The tenancy was determined by the notice to quit, or at any rate by the decree. The leniency of the landlord allowed Devlin to remain in possession till January, 1871, but no tenancy was thus created. This question could not have arisen under the 3rd or 4th section of the Act, for in cases of a claim under those sections it is plain that a tenancy must be in existence after the passing of the Act. But it was said in the Court below that as the word "tenant" did not occur in the first clause of the 1st section it was not necessary that the claimant should be a tenant. In answer to that we say that the 1st section

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\* Land Appeal, Omagh Assizes, 21st and 22nd July, 1871 ; 5 IR. L. T. REP., 160.

would be inoperative without the 16th, which gives the Court jurisdiction in this case. From that it is clear that the claimant must have been a tenant since the passing of the Act. The word "holding" used in the 16th section, and defined in the 71st, makes this certain. The title of the Act, which is "The Landlord and Tenant Act," also shows that the relation of landlord and tenant must have been subsisting. Can the Act apply to the case of a mere trespasser? The term "tenant" is defined in the 70th section, which goes on to say that where the tenancy of any person having been a tenant under a tenancy, which does not disentitle him to compensation under this Act is determined, he shall, notwithstanding that, be deemed to be a tenant till the compensation has been paid. But it was necessary that such a claimant should have been a tenant under a tenancy not disentitling him to compensation under the Act. Here there was no tenancy at the time of the passing of the Act. To entitle this man to claim, his tenancy must have been one which determined after the passing of the Act.

*M'Laughlin* for the claimant. The landlord having permitted the tenant to remain in for a year at least after the determination of the tenancy, has created a new tenancy at sufferance. The 69th section of the Act provides that "where any tenancy at will, or less than a tenancy from year to year, is created by a landlord after the passing of this Act, the tenant under such tenancy shall, on quitting his holding, be entitled to notice to quit and compensation in the same manner in all respects as if he had been a tenant from year to year." But the word "tenant" is not to be construed in the strict way in which the appellant reads it. The effect of the Act is that whatever was in existence by the will of the landlord before the passing of the Act became, after the Act had passed, the law of the land. The claimant here served his claim within the time prescribed by the 4th of the Rules under the Act, which provides that the notice of claim shall be served at latest within one calendar month after the tenant quits, or is deprived of possession by the landlord. Within the time so fixed Devlin served his claim for the sum of £69 due to him by way of compensation under a tenant-right custom by which he would be entitled, *on quitting his holding*, to sell his interest to an incoming tenant. His claim was perfectly right, and within the terms of the Act, and was properly allowed by the Chairman.

MONAHAN, C.J., thought that if the custom was that a tenant against whom a decree of ejectment had been obtained should still have the benefit of the tenant-right, in that case the Act would apply. That was proved to have been the custom. However, he would take time to consider it.

July 22nd.—MONAHAN, C.J.—I have looked into this case of Lord Charlemont's, and am now prepared to decide it. The facts of the case are these :—The claimant was tenant from year to year under the Earl of Charlemont, and had been served with notice to quit. That notice expired before the 12th of January, 1870, probably on the 12th of November, 1869. On the 12th of January, 1870, the decree of the Chairman for possession was made on that notice. Now, it is plain that the tenancy expired on the serving of the notice to quit. Therefore, in strict legal parlance, the tenant was not in possession under a tenancy from the 12th of January, 1870. He remained in possession till the 10th of January, 1871. He was not then tenant, though in possession, at the date of the passing of the Act. Now, the question is, what was the status of the claimant in relation to the tenant-right custom at that time? The usage on the estate was, as was proved here, that although the tenancy had been determined, and the claimant had been served with notice to quit, and the landlord had the full power to turn him out of possession, yet, by virtue of the usage, the claimant was entitled to sell the property for what he could get. The usage was to permit him to do so. Now, the facts being so, what are the provisions of the Act? The Act says that the usages called the Ulster tenant-right custom "are hereby declared to be legal, and shall, in the case of any holding in the province of Ulster proved to be subject thereto, be enforced in manner provided by the Act." The duty of the Judge in deciding any of these cases is to carry out the object of the Act, and to put its provisions into execution honestly, fairly, and liberally—not to enter into the question of the fairness of the Act itself, but to carry it out impartially between the parties. Now, I think the true construction of the Act is, that where a tenant enjoyed the benefit of the custom by the courtesy of the landlord before the passing of the Act, now since it has passed he is entitled to that benefit, not by courtesy, but by legal right. I know that as against these arguments it was urged that the claimant in this case was not strictly a tenant at all. I am told that no legal tenancy was existing in this case at the time of passing the Act, and therefore that it did not apply. But he had been a tenant, and by reason of his expired tenancy he had a right to the privileges of the Ulster tenant-right. I do not find anything in the sections of the Act that were

referred to by the appellant to lead to a different opinion—most of them refer to the case of a tenant whose tenancy had expired. The 16th section provides that “Every tenant entitled under this Act to make any claim in respect of any right, or for payment of any sum due to him by way of compensation, and *about to quit* his holding, may, within the prescribed time, serve a notice of such claim on his landlord; the notice shall be in writing, and shall state the particulars of such claim, subject to such amendment as the Court may allow, together with dates,” &c. Now, that does not say that the man making such claim is to remain a tenant. The claim is to be made after the tenancy has expired, and there is no inconsistency in that; it is not a mistake to describe him as tenant, for he has been a tenant. That is clear from another section of the Act (s. 70), which says, “The term tenant in relation to a holding, shall mean any tenant from year to year, and any tenant for a life or lives, or for a term of years under lease, whether his interest has been acquired by original contract or otherwise; and where the tenancy of any person having been a tenant under a tenancy which does not disentitle him to compensation under this Act is determined or expiring, *he shall, notwithstanding such determination or expiration, be deemed to be a tenant until the compensation, if any, due to him under this Act has been paid.*” I therefore affirm the decree, and as I have no doubt whatever about it, I will not reserve any question.

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THOMAS AUSTIN, Appellant; Major THOMAS SCOTT, Respondent.\*

*The ordinary clause in a lease for surrender at the expiration of the term does not destroy the tenant's right to claim for compensation under the first section of the Land Act.*

Quære.—*Can a restricted tenant-right established since 1848 cut down the ancient usage in the case of a tenant who entered as far back as 1794? Point reserved.*

This was an appeal from the decision of the Chairman, who had dismissed the claim of the appellant in the Court below.

Major Scott had obtained a decree on ejectment for overholding against Thomas Austin, who was tenant of lands in the parish of Balteagh, co. Londonderry, held under a lease dated the 1st April,

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\* Londonderry Summer Assizes, 1871, before Chief Justice Monahan, 5 IR. L. T. REP., p. 173. See case before Chairman, *post*.



1794, the term of which expired in August, 1870. To the lessees' interest in one-half of the lands comprised in that lease Thomas Austin had been entitled. The whole rent reserved by the lease was £10 Irish, or £9 17s. 6d. sterling. On the 20th August, 1871, Thomas Austin filed a claim for the following tenant-right:—"A right to be allowed to sell the said holding to the highest bidder, subject to a fair rent, and to the landlord's approval of the incoming tenant as to character and solvency"—in respect of which the claimant demanded £250.

Major Scott, the landlord, offered him £52 10s., that being five years' rent at the present value of the land, in accordance with the custom of the estate, which he said was that of allowing no tenant in parting with his interest to receive a larger sum than five years' rent, and insisted at the same time that the lease of the 1st April, 1794, contained a covenant that, on the expiration of the term, the tenant should leave and yield up possession to the landlord, and that the custom alleged was repugnant to that covenant.

The Chairman held that the covenant for surrender at the expiration of the lease barred any claim for compensation.

*M'Causland, Q.C., Greer, and M'Laughlin*, for the appellant.

1st. There is no difference as regards the custom whether it be the case of a yearly tenancy or tenancy under a lease. 2ndly. The custom to give not more than five years' rent is not the real custom, but what is called in this country a broken-down custom, which the landlords have been endeavouring to introduce on their estates.

Hugh Lane, John Barre Beresford, and Henry Wiggins, land agents, were examined, and gave evidence of the existence of the Ulster custom on the estates surrounding Major Scott's property—on the Fishmongers', the Salters', the Skinners', the Grocers', and Lord Waterford's estates. On these estates the tenants had liberty to sell to the highest bidder, and the same custom existed whether the tenant held under lease or from year to year.

*Carson, Q.C., and Holmes*, for the respondent.

The landlord was dissatisfied with the claimant, because he was a non-resident tenant, who let his farm in con-acre. When the lease expired Major Scott offered the claimant five years' rent, which Austin accepted at first, and afterwards repudiated, believing that he should get more. He was, however, entitled to nothing, for it is clear that tenant-right does not apply in this part of the

country, at least to the case of a tenant who is not an occupier. The covenant in the lease excludes him from claiming. If he has any right it cannot be to more than the custom which we will prove, and which did not permit a tenant to get more than five years' rent. The first section of the Act states that the usages prevalent in the province of Ulster, and which are known as the tenant-right custom, are hereby declared to be legal, and shall, in the case of any holding in the province of Ulster, be enforced in the manner provided by this Act—that is to say, the usages existing and prevalent at the time of passing the Act. It does not establish usages of 38 or 40 years ago.

Mr. King, agent of the property, proved that since his appointment in 1848 the practice of giving only five years' rent always existed. His evidence was corroborated by William George, who had acted as arbitrator between an incoming and outgoing tenant.

MONAHAN, C.J.—If the appellant wishes to prove a custom different from that deposed to by Mr. King, he should give some evidence of its existence on this particular estate, in addition to the proof given of the usages on the neighbouring estates.

*M'Causland*, Q.C., submitted that Mr. King's evidence only went back to the date of his appointment as agent over this estate, and that it was to be presumed that the custom previously was the same as on the adjoining estates. It was difficult to obtain evidence of the old custom directly; however, there was some evidence.

Robert Pollock proved that about 40 years ago he bought five acres of ground on Major Scott's estate from a yearly tenant. He gave about ten years' purchase. Some time after that he bought six acres for £27—the rent was about £5 yearly. Some time after he bought three acres, for which he had paid £16. He thought the rent of that lot was not more than £1. The five years' purchase was established when King became agent, but he thought the tenant-right custom before that was the same as on the surrounding estates.

Samuel Deans and John Jameson proved that more than five years' purchase—in one case eleven and in another seven and a-half years' purchase—had been given for farms, either on lease or from year to year, on this estate before the introduction of the new custom.

Henry Hazlett proved that if the farm in question belonged to any of the adjoining estates it would be worth in his opinion £200. Andrew Austin said he would give £150 for it, and if he lived nearer it he would give more.

MONAHAN, C.J.—I am perfectly satisfied that since the time when Mr. King became agent a practice or usage has existed on the estate different from the usage which existed before his time; and I am perfectly satisfied that that new usage exists against the will of the tenants, and that they would rather live under the old usage. Now I am ready to hear arguments on the evidence.

Carson, Q.C., insisted that the Act only legalized the customs existing at the date of its passing.

M<sup>c</sup>Causland, Q.C.—Major Scott may insist that he has established a new tenant-right as far as others are concerned, but he never made any change as regards the appellant. The appellant has a right to rely on the old tenant-right which his ancestors held, and which has never been changed as far as he is concerned. That old custom has now become law. It was to prevent the system which Major Scott and other landlords were introducing, of cutting down the tenant-right, sometimes to five years, sometimes to three years' purchase, that the Act was passed. The essential characteristic of the legalized custom is liberty to sell, which Major Scott is trying to get rid of.

MONAHAN, C.J.—This is a case which is likely to be of every day's occurrence, and therefore I think that I will reserve the question for argument before the Judges.

Greer expressed a hope that the case would be so framed as not to give the sanction of the title "usage" to Major Scott's restricted tenant-right. A "custom" or "usage" is something that sprang up gradually or almost insensibly in the course of time, involving and ultimately controlling all that came within its influence. How could that term apply to the alleged usage introduced by Mr. King, and imposed on pain of confiscation upon all the tenants who were obliged to sell within the last 20 years? He hoped, therefore, that his Lordship would not describe it as a usage. As to the other point, there was ample proof that the existence of leases in no way affected the tenant-right custom, save by preventing an increase of rent till they had expired.

MONAHAN, C.J., held that the ordinary clause in a lease for

surrender at the expiration of a lease did not destroy the tenant-right or claim of the tenant for compensation. His Lordship reserved the question whether the restricted usage of five years' rent established on Major Scott's property since 1848 had been legalized by the first section of the Act. A case would be stated for the Court for Land Cases Reserved. But the other point he would not reserve, as he was clearly of opinion that the tenant-right prevailed notwithstanding the terms of the lease.

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FLECK v. LORD O'NEILL.\*

*Subletting, though a violation of an office rule, is not a forfeiture of the tenant-right, it not being proved, as a matter of fact, to be so. Refusal by the claimant of fair and reasonable offers to sell, and the demand of a sum for his tenant-right far exceeding the value, are equities under section 18 to diminish the amount of compensation awarded.*

Quære, does the 15th section apply to a tenant-right claim?

The facts of this appeal are stated in the report of the case before the Chairman (*post*, p. 298). Both parties had appealed; the claimant, on the ground of insufficiency of amount decreed; the respondent, generally.

R. M'Donnell, Q.C. (with him Donnell), for the claimant, argued that the lands were not town-parks. Broughshane was not a town within the meaning of the Act. The lands did not bear increased value as accommodation lands for the inhabitants of the village; an ordinary farmer would give as much. Even if they were town-parks, the 15th section did not apply to the Ulster custom. The claim was not for compensation under the Act; it was for compensation under the custom. "The provisions of the Act," as to compensation, were the general provisions applicable to all tenants. The Ulster tenant did not necessarily claim compensation, he could claim the benefit of a right. The amount to be decreed was what the tenant-right would bring in the market between tenant and

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\* Land Appeal, Belfast Summer Assizes, 1871, before Judge O'Brien.

tenant. This was the principle laid down in *Johnston v. Patton* (*ante*, p. 178).

Evidence to the foregoing effect was given; and the value was fixed by the claimant's witnesses at from £200 to £250.

*Orr*, for the respondent, argued that no compensation could be recovered in respect of the houses. The 71st section of the Act said:—"This Act shall not apply to any holding which is not agricultural or pastoral in its character, or partly agricultural or partly pastoral." These houses were not in the holding. They were separate; but it so happened that they were let to Fleck at the same time, although essentially different holdings. The appellant had admitted the subletting, and they would be able to prove that subletting was distinctly prohibited on the estate. Of course, on such a large estate it would be impossible for the agent to know every individual case. That being so, they contended that the essential incident of this custom is that the tenant should not sublet without the consent of the landlord. The contract between Lord O'Neill and Fleck was this:—"If you, Fleck, go into this tenement and behave properly, pay your rent, and do not sublet without my consent, then I will, at the expiration of the tenancy, whether I put you out, or you quit voluntarily, allow you to sell to a good and solvent tenant. If you don't keep your part of the bargain, I shall not be bound to keep mine." Not having performed his part of the contract or usage, Fleck could not come into Court and say that, although he did not do so, he would call upon the landlord to perform his. The question then arose—were these town-parks? The Chairman was clearly of opinion that they were town-parks. The definition of town-parks was given at the beginning of the 15th section—"Any holding ordinarily termed 'town-parks,' occupied as a farm, which shall bear increased value as accommodation land over and above the ordinary letting value of land, and shall be in the occupation of a person living in such city or town." These particular  $3\frac{1}{2}$  acres had been since let to Mr. Dickson at £3 per acre, while it would be proved that in the adjoining village, which also belonged to Lord O'Neill, the land was let at from 18s. to 25s. an Irish acre, and the average over the whole estate was only 13s. 6d. The village of Broughshane was not an agricultural, but a manufacturing village. There was a factory, which employed 500 hands, and there were bleaching greens in the neighbourhood, large

scutch works, and beetling engines. Most of these workpeople lived in the village, and, therefore, it was not an agricultural village at all. Most of them had cows, and they were prepared to give a larger price for land than the neighbouring farmers, and they did give it.

*Donnell*, for the claimant. This is an agricultural holding. A holding of a quarter of an acre, or more, not being a cottage allotment, is within the Act (sec. 15, sub-sec. 5); and therefore agricultural or pastoral. This considerably exceeds that. It has been treated in the usual course of husbandry; it is within the custom. Then as to subletting: there is no proof that this creates a forfeiture of the tenant-right; the inference of fact on this state and the presumption of law are otherwise. Forfeiture should be construed strictly. As a matter of fact, these lands were not town-parks; they were never known as such, and wanting that incident, they are not within sec. 15. Even if they were, sec. 15 only applies to claims for compensation *under the provisions of the Act*; this is a claim for a right, or for *compensation under the custom*. The 1st sec. in no way limits the tenant-right, unless it is perfectly clear that sec. 15 does so, the inference must be the other way. Then as to value: the selling price is the only basis of estimate. The price of a thing is what it will bring (*Johnston v. Patton*, Land Appeal, *ante*, p. 178).

O'BRIEN, J.—There are some points of the case upon which I am ready to announce my decision, but the ultimate result will depend on my consideration of the evidence given as to amount. The first is that by the violation of the rule of the office as to the subletting, the claimant had forfeited his right to compensation under the Act. My opinion is, that he has not. I do not think that any evidence of the custom went to this extent, that by doing so he had forfeited it. Mr. Bulwer gave his evidence fully and candidly. He stated his experience for only two years, but Major M'Clintock, who was examined before him, spoke for the much longer period of eighteen years, from 1851 to 1869. Neither of them proved it, and upon looking over the evidence, I am disposed to adopt the view that although it might be a violation of the rule, it was not a forfeiture of the right. The subletting continued down to 1868 to a much greater extent than it did afterwards. I do not find that the estate office acting for Lord O'Neill considered at the time that there was a forfeiture of the tenant-right custom. It is not for me to say whether he did right in subletting, but he seemed to have acted

in the matter with considerable perseverance for some time, particularly when the offer was made to him, if he was not able to pay his rent without subletting, to sell his interest. That showed that the contemplation of the parties was that the tenant-right—the Ulster tenant-right—was not forfeited by reason of the tenant having sublet his premises. Another question had been raised with regard to these lands, whether they were town-parks within the meaning of the 15th section. If I came to the conclusion that they were town-parks within the meaning of the 15th section, I certainly would not be prepared at present either to dissent from the conclusion at which Mr. Otway arrived, or adopt that conclusion, without reserving the case for the Court for Land Cases Reserved. But I do not think these fields come within the description in the 15th section. That section defines town-parks as “any holding ordinarily termed ‘town-parks,’ adjoining or near any city or town which bear increased value over and above the ordinary letting value of land occupied as a farm.” Now there was one condition which I shall pass over at present; that is the size of the place—whether it was a city or town within the meaning of the Act. Passing over that, there was no satisfactory evidence before me to show that it always bore an increased value as accommodation land over and above the ordinary letting value of land. One of the witnesses, who gave his evidence most fairly, was asked whether the quality of the other land was as good as the quality of the five and a half acres, he declined to say so, and therefore there is no evidence to satisfy me that these fields came within the definition of town-parks—“bearing an increased value as accommodation land over and above the value of land occupied as farms.” It was true that the agent of the estate, Mr. Bulwer, considered them as accommodation lands, and also believed that they were held to be town-parks, yet the evidence that they were such fails to satisfy me. Broughshane appeared to be a straggling village—one street—a street of some length—one witness said half-a-mile in length; another said, from one to another point, it would be more than that. And of what did it consist? Of a couple of hundred houses, one half of them cottier houses—one-story high, and a great many of them thatched. I ground my decision in the present case on the fact that the requisites pointed out by the 15th section are wanting in this case, and it is unnecessary for me to consider the important question, whether the 15th section applies to land under the Ulster custom. With regard to the 71st section, Mr. Law failed to satisfy me that this is not an agricultural or pastoral holding, or partly agricultural or partly pastoral. There was this element in the case, that it appeared to have been the admission of the parties throughout from the time that Ferguson originally purchased from a man called

Ritchie up to the time the present claimant bought it, this holding was within the tenant-right usage; and if it was, there certainly would be some difficulty in calling on the Court above to come to this conclusion—that although the Ulster tenant-right existed in regard to holdings of this particular class and character, the operation of this statute was to prevent it applying to a certain portion of the holdings within the 71st section, to which it had formerly applied. I come for the present to the conclusion that these are not town-parks within the meaning of the 15th section. I differ, no doubt, from the learned Chairman below. Of course, every respect possible is due to the opinion at which the Chairman had arrived. He appeared to have investigated the case with great care, ability, and anxiety, as every one who knew him would suppose. Indeed I am rather disposed to adopt the Chairman's construction upon the 15th section, if it were necessary for me to do so. The remaining question was as to the amount. If the conduct of the tenant did not disentitle him to compensation under the tenant-right custom, and if the land was not town-parks, what amount was he entitled to? That is the only part of the question on which I shall reserve my opinion, as there are several matters that I wish to consider. I do not approve at all of the conduct of the tenant. It appears that this man was permitted to dispose of his interest, and that he went to the office and requested £250 for it. They said they would not give him one-half of that. Again, there was the valuation for certainly £200. I am not disposed to say that that was the value of it, or that the value amounted to so much. Then I also think that if this man were offered fair and reasonable terms to sell the place on different occasions, and he chose to keep it or to ask a sum far exceeding its value, that is a circumstance for me to consider—that he had rendered this litigation more or less necessary. However, upon that part of the case I shall, for the present, reserve judgment.

O'BRIEN, J., on the following day, said that he had given the question the best consideration in his power. He had already given his decision as to whether the lands were subject to the Ulster tenant-right, and as to the objection that the premises were town-parks, he believed it was not sustainable. The only question, therefore, was the amount he would give. He had gone through the evidence carefully. He had found that £165 was given for the holding in 1858, and the evidence was that £20 would put them in as good condition as when the plaintiff got them. Since £165 was given for them, the value of land had not decreased; but as he had said the other day, Fleck's conduct was not of the most satisfactory character, and he thought that Fleck might have obtained a settlement equally satisfactory to himself as that which he was about to



pronounce. Considering the conduct of the plaintiff, and he thought he had power under the Act to take this into consideration, the conclusion he had come to was to increase the amount given by the Chairman from £100 to £140, from which was to be deducted a year's rent which was due. He would give a decree for that sum, and, of course, dismiss Lord O'Neill's appeal.

*Randal M'Donnell*, Q.C., said a very grave question arose out of his Lordship's decision—whether the Ulster tenant-right custom was subject to the 18th section of the Act. It involved the holdings under the Ulster custom everywhere, and his Lordship's decision would give to the Chairmen of counties a vast discretion, and he wished his Lordship to reserve this point for the Court of Appeal—does the 18th section apply to the Ulster custom?

*Law*, Q.C., said he had no objection if the whole case were reserved.

*M'Donnell* pressed the point that the question he had raised should be reserved for the Court of Appeal.

O'BRIEN, J., said that, on the evidence, even if deterioration were not taken into account, he would not give more than £150, and he was giving £140, which he thought a very fair sum.

The question was not reserved.

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EARL OF LEITRIM, Appellant; HUGH FRIEL, Respondent.\*

*Where tenant-right had existed on the estate of the appellant (the respondent in the Court below) previous to and up to the time of his coming into possession, and the claimant had come into a portion of his holding by a tenant-right purchase, and tenant-right was proved to exist on the surrounding estates, the claimant's holding was held to be subject to the custom, though of late years the landlord had denied the rights of the custom to evicted tenants.*

This was an appeal from the decision of the Chairman of the county Donegal, who had awarded the claimant a sum of £250, the value of his tenant-right.

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\* Lifford Spring Assizes, 1872; before Judge Lawson; 6 IR. L. T. REP., p. 86.

For the claimant it was proved that his father was in possession of forty-nine acres of land ; that on his father's death, in 1849, his mother, Grace Friel, obtained possession ; that the claimant and his brothers, Patrick and John, farmed a portion for themselves, and their younger brother, James, remained living with his mother ; that, in 1852, Patrick, wishing to emigrate to America, sold his portion to the claimant, with the knowledge and consent of the agent of the estate ; and this portion with his own share constituted the premises from which he was now evicted. It was also proved that tenant-right existed on this and the neighbouring estates during the lifetime of the late Earl of Leitrim, but that the present Earl refused to allow it from the time that he had come into possession. The claimant and his brother also swore that the tenant-right of the farm was worth £250. For the appellant it was proved that these lands were part of the lands of Doaghmore, demised by Robert Clements, in 1767, to the Rev. J. Steward, by a lease that expired in 1830 ; that on the expiration of this lease the father of the claimant, with divers of the tenants, was found in possession under the system of rundale, where each occupier had scattered pieces of tillage intermixed with similar pieces belonging to others ; that in the year 1848 this system was put a stop to on the estate, and an arrangement of the holdings effected, and forty-nine acres were allotted to James Friel, at the rent of £5 5s. On his death, Grace his widow, was accepted as tenant, and no one else was tenant until 1860, when the land was divided, and five acres given to Grace, at the rent of £2 ; thirty-two acres to Hugh, the claimant, at the rent of £6 ; and the remainder to John, at the rent of £2. Grace and John were subsequently evicted, without any compensation or claim made by them. It was also proved that the late Earl of Leitrim was tenant for life only ; that the present Earl succeeded to the title and estates in the year 1854, and that he had always refused to allow tenant-right on his estates.

LAWSON, J.—It has been proved in this case that the custom of tenant-right existed on the Earl of Leitrim's estate, previously to the time that his Lordship, the present Earl, came into possession, and it still exists on the surrounding estates ; and it is also in evidence that the claimant came into a portion of his holding by a purchase, which I shall hold to be a tenant-right purchase, made with the full knowledge of the then agent of the estate. I will hold that this holding was subject

to the custom, and that there having been no notice given to the tenant to the contrary, it is still subject to it. I consider the sum awarded by the Chairman reasonable. I therefore affirm the decree with costs.

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ARMSTRONG v. ELLIS.\*

*Semble, the consent of the landlord to the subdivision by the tenant of his holding is an essential incident of the Ulster tenant-right custom.*

This was an appeal from William Barron, Esq., the Chairman for the county, allowing Hugh Armstrong, the claimant, the sum of £228 as compensation under section 1 of the Landlord and Tenant Act, 1870. The claimant appealed upon the ground that the sum allowed was inadequate, and Mr. Ellis, the landlord, also appealed upon the ground that in point of law no compensation at all should have been allowed, inasmuch as the tenant's holding had been subdivided without the landlord's consent, and that in any case the sum allowed by the Chairman was excessive. The facts were as follows :—The lands in respect of which the claim in this case was preferred had originally consisted of two separate farms, held under the same landlord. The claimant's father, Alexander Armstrong, had for many years prior to the year 1847 been in possession, as tenant from year to year, of the smaller farm, which contained about 25 Irish acres; and in the year 1847 he purchased the good will of the larger farm, which was also held under a tenancy from year to year, and which contained 30 Irish acres. From the year 1848 both farms were treated by landlord and tenant as one holding, subject to an entire rent, for which one receipt was given. Alexander Armstrong died in the year 1869, having by his will bequeathed the larger farm to Hugh Armstrong, the claimant, and the smaller to Charles Armstrong, another son. The landlord, Mr. Ellis, objecting to this subdivision of the holding, served a notice to quit, and ejected both the claimant and Charles Armstrong in the spring of 1871. Subsequently Charles Armstrong was put into possession of the entire holding by the landlord. Hugh Armstrong then filed the claim in this case against Mr. Ellis, and the learned Chairman awarded him the sum of £228, as above mentioned. The case was virtually a contest between the two brothers.

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\* Monaghan Spring Assizes, 1872, before Baron Hughes; 6 I.R. L. T. REP. 63.

*Falkiner*, Q.C., and *Porter*, for the claimant.

*Law*, Q.C., and *Munroe*, for the respondent, contended that the subdivision of the holding was a violation of the custom, and that the claimant was for that reason not entitled to claim any compensation.

Some evidence was given to show that subdivision of holdings without the consent of the landlord was not part of the Ulster custom.

HUGHES, B., after the case had proceeded for some time, suggested that it was essentially a case for settlement, it being substantially a contest between two brothers.

It was then arranged that Charles Armstrong should pay the claimant £150, and that each party should bear his own costs.

HUGHES, B. added that, as the legal point involved in the case was one of considerable importance in connexion with the Ulster tenant-right custom, he felt it his duty to express his views on the subject. He (the learned Judge) was clearly of opinion that the consent of the landlord to the subdivision of his holding by the tenant was an essential incident of the Ulster tenant-right custom. The real question in this case has been, Whether the two farms formed one holding or not? The evidence which had been given proved beyond a doubt that there was but one holding. As the matter stood, he (the learned Judge) felt himself bound in point of form to reverse the decision of the learned Chairman, but without costs. The learned Judge further observed that he felt obliged to Charles Armstrong for agreeing to pay his brother the £150, inasmuch as there was no legal obligation on him whatsoever to do so.\*

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\* It does not appear whether evidence was given in this case, that subdivision without the landlord's consent would, as a matter of fact under the custom, forfeit the tenant-right. In *Fleck v. Lord O'Neill*, the evidence was that breach of the office-rules as to subletting, though it might lead to the tenant's eviction, would not be customarily a forfeiture of the tenant-right. It is apprehended that in very few cases will it be found that breach of covenant in a lease, or breach of an implied agreement in a yearly tenancy, forfeited the tenant-right; and as a matter of law, forfeiture should be construed strictly. See *Baspool v. Long*, ante, p. 137.

## M'CREANOR v. HERON.\*

*A claim for £600, under section 1, having been filed by the administrator with will annexed of a deceased tenant, and letters of administration stamped as of £100 value having been offered in evidence,*

*Held, that the case could not be entertained until the letters of administration were properly stamped, and that section 59 did not apply to the case.*

This was an appeal from a decision of Robert Johnson, Esq., Q.C., dismissing the claimant's claim. The claim had been filed by M'Creanor as administrator with the will annexed of his father, who had held a farm, as tenant from year to year, under the respondent. The amount claimed was £600. The claimant's father had by his will purported to bequeath part of the farm to the claimant, and the respondent resisted the claim upon the ground that subdivision without the consent of the landlord was contrary to the Ulster custom.

Falkiner, Q.C., offered, in evidence of the claimant's representative character, letters of administration, stamped as of £100 value.

HUGHES, B., observed that the letters were insufficiently stamped, and said that he could not entertain the case until they had been properly stamped.

Donnell submitted that the Court had power, under section 59, to appoint an administrator for the purposes of the case, or to remit to the Chairman under section 24.

HUGHES, B., observed that section 59 applied where from the insignificance of the property of the deceased, or from other cause, no personal representative had been raised, and held that it did not apply to the present case, where there was a personal representative in existence, although one who could not for the time make use of his representative character. The learned Judge added that the only thing which he could do would be to remit the case to the Chairman under the provisions of section 24, in order that the defect in the evidence might be remedied.

Subsequently by consent of the parties a decree for £100 was granted.

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\* Downpatrick Spring Assizes, 1872, before Baron Hughes; 6 IR. L. T. REP., 63.

ANDREW ELLISON, Appellant; FRANCIS MANSFIELD, Respondent.\*

*Proof must be given by a tenant evicted on the termination of his lease that the usage applies to such a case, in order to support his claim.*

*Quære—Does the Ulster tenant-right custom apply to lands held under lease?*

Appellant held under a lease dated the 1st of May, 1868, for a term of 21 years and the lives of two persons named in the lease. The lease expired in the month of May, 1871, on the death of the last life. Ejectment was brought in the month of October, 1871, by the landlord, who obtained a decree for possession. The execution of the decree was stayed until the claim then brought by the tenant should be disposed of. The claim, which was brought under the Ulster tenant-right custom, was heard by the Chairman, and dismissed on the ground that there was no evidence to show that the custom in that part of the country extended to cases in which tenants were evicted at the termination of leases. Against that decree the tenant now appealed.

*Holmes*, for appellant (claimant below).

*Carson*, Q.C., and *M<sup>c</sup>Conchy*, for the respondent (respondent below).

Evidence was given of the existence of the tenant-right custom in the case of holdings not under lease, but not of any case in which it was allowed in that neighbourhood on the expiration of a lease.

LAWSON, J.—The judges have never decided that this Ulster custom can apply to lands held under lease at the expiration of that lease. I entertain serious doubts upon the point, and if a case of that kind should arise, I will reserve it for the Court of Land Cases Reserved. But in this case there is no evidence that the usage applied, and I will therefore dismiss the appeal with costs.†

\* Before Lawson, J., at Lifford Spring Assizes, 1872; 6 IR. L. T. REP., 133.

† In the course of his Lordship's evidence before the Lords' Committee on the Landlord and Tenant (Ireland) Act, 1870, Judge Lawson said with reference to this case:—

"Evidence was gone into as to whether in Donegal that usage did exist of tenant-right upon the expiration of a lease. I remember that Sir James Stewart's agent, and two or three other agents were examined, and the result of the evidence was, in my mind, that there was no such usage to be found in that district."—(Q. 1790).

EARL OF LEITRIM, Appellant; PATK. GALLAGHER, Respondent.\*

*A field near a village in the county of Donegal, in the occupation of a person living in the village, held not to be a town-park.*

*Where separate rent receipts are given by the same landlord to the same tenant in respect of a house and a field, the house being in a village, is not within the operation of the Land Act, 1870.*

Quære—Does s. 15 apply to the Ulster custom?

This was an appeal by the landlord from the decision of the Chairman of the county of Donegal (reported 5 IR. L. T. Rep., p. 188).

The tenant also appealed on the ground that the amount awarded was insufficient.

It appeared that on the 1st of November, 1870, Patrick Gallagher had been served with a notice to quit his house and garden in the village of Milford, and his field in Dumbraun, a short distance from Milford. He afterwards lodged a claim for £135, under the 1st section of the Act, as the value of the tenant-right. Separate rent receipts had been given by the landlord in respect of the house and the field. Under these circumstances the Chairman held that the tenant had two separate holdings, and that the house did not come within the Act; and he allowed £12 as the value of the tenant-right of the field, on the evidence of Mr. Reid, who swore that that would be a low value for it.

*M'Causland*, Q.C., and *William M'Loughlin*, for the respondent (the claimant below). There is no doubt that the claim must be allowed in respect of the field, which is not a town-park. No one could say that a field near the village of Milford was a holding ordinarily termed a town-park. The house and field are, in point of fact, one holding. They are held under the same landlord. The entire holding is subject to tenant-right, and the claim should be allowed for all.

Mr. Reid gave evidence that the tenant-right of the field was worth £18. The reason he had said £12 in the Court below was

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\* Before Lawson, J., at Lifford Spring Assizes, 1872; 6 IR. L. T. REP., 183.

that he had omitted part of the field in the measurement. Tenant-right existed with respect to houses in Milford. The tenant-right of this house would be worth £50. No lands near Milford were called town-parks.

*Carson, Q.C., and Holmes*, for the appellant (the respondent below). The Chairman rightly held that the house and field are distinct holdings. It is not in dispute that separate rent receipts were given. S. 70, therefore, excludes all claim in respect of the house. As to the field, it is a town-park, and the 15th section exempts it from compensation. If it were within the Act, the amount ought not now to be increased.

*LAWSON, J.*—I think that the house and field were held separately, and that the tenant is not entitled to any compensation with respect to the house. I do not think that a field situated as this one is comes within the denomination of "town-park," Milford being a poor village; and I hold that the field (which is subject to the custom) is within the operation of the Act. I believe the evidence of value now given to be correct, and therefore I alter the decree, and award £18 in place of £12.

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#### BURNS v. EARL OF RANFURLEY.\*

*Where a lease had been granted, not as a continuation of a previous tenancy, but to strangers to the estate, for a specific purpose, and to recoup a specific loss, and which contained special covenants against alienation—the tenant-right custom will not be held to attach on its termination, there being no evidence of such a custom on the estate of which the holding forms a part.*

*The tenant-right may exist at the termination of a lease, but this must be specifically proved.*

*Donnell* (special), with him *M'Laughlin*, for claimant:—This was a claim for tenant-right at the expiration of a lease. The Ulster custom is retrospectively legalized as a local or district law; and

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\* Land Appeal, Omagh Summer Assizes, 1872; before Keogh, J. See report of case before Chairman, *post*, p. 251.



therefore forms necessarily a silent ingredient of every contract within the range of the district, from which it is not excluded either expressly or by necessary implication. It makes no matter that this custom is opposed to the common law; for many local customs which have been declared legal by judicial decision, such as the customs of gavel-kind and Borough English, are contrary to the common law. What the judges have done, Parliament may do. But the custom is not inconsistent with the lease. The custom attaches at the termination of the tenancy; and there can be no inconsistency between such a custom and covenants which regulate the terms of the tenancy during its existence (*Holding v. Pigott*, 7 Bing., 478). And there is no inconsistency between the covenant to deliver up the premises and the custom; for the custom admits the landlord's right to resume, and the tenant's duty to deliver up the possession—but subject to tenant-right compensation. And under sec. 4, unless a lease expressly excludes compensation, the tenant, though bound to deliver up at the end of the term, may claim compensation for improvements; and, in the case of any lease made after the Act for less than 31 years, compensation for disturbance as well; and the tenant may, under sec. 20, hold possession, notwithstanding the covenant, until the compensation due is paid or deposited.

KEOGH, J.—What relation existed between these parties when this tenant took this lease in the year 1851? Was the tenant in possession?

Donnell—No. The *habere* was executed, and Messrs. Fox and King, the original lessees from whom Burns bought for £200, were granted this lease by Mr. Cuppage, whose estate the present respondent had bought in the Landed Estates' Court, in order to satisfy a sort of equitable claim which King, the previous occupant of the land, had by reason of his having been ejected for non-payment of rent due under the *toties quoties* lease by which he then held.

Holmes, for respondent.—The lease contains clauses against subletting or assigning; and the object of the lease was to put an end to any claim.

Donnell—But the question now to be tried is whether that does put an end to his claim, and if by the custom of the district, the tenant-right underlay the lease, the tenant-right was a portion of

the benefit which that lease conferred. The question here is—does the tenant-right custom exist along with a lease? Does that custom give the tenant an interest beyond the lease? Burns, the claimant here, gave £200 for the assignment of the lease from Messrs. Fox and King. What was purchased in that transaction? What was bought by him was not the mere interest in the lease, but the tenant-right, the right of continued occupation at a fair rent, and the claim to compensation in the event of the landlord resuming possession of the land and refusing the liberty to sell. We have evidence to show that, though there has been exceedingly little of what is called disturbance of tenants on the termination of a lease, yet, on the surrounding estates, and on the estate of the Earl of Ranfurley, after the expiration of leases, and before the creation of a new tenancy, compensation was given for the tenant-right by sale or otherwise.

KEOGH, J.—Where there is a written contract binding between the parties I cannot attach the custom to that holding by hearing evidence in reference to other estates.

Donnell—Surely your Lordship will hear evidence from unimpeachable witnesses as to the custom on the adjoining estates, there having been no opportunity for exercising the custom on the Cuppage estate. This and another are the only holdings on this estate not held under *toties quoties* leases *lex non cogit ad impossibilia*; and if we show that on the nearest holdings to which the custom could attach, it has been exercised, the presumption is that it attaches to the present holding; and it will be for the Earl of Ranfurley to show something to exempt it from the operation of the custom, which is the local law of the district.

KEOGH, J.—Where there is a written agreement between Cuppage (a former owner), and Fox and King, who held before the claimant, I cannot attach the custom to this property by your telling me what has been done on other estates.

Donnell—But if we show on the adjoining estates the exercise of this right of sale of the tenant-right interest at the expiration of the lease, and that the tenant-right generally exists on the respondent's estate, it is not necessary to show that a special incident of the custom—the right of sale—was exercised at a special time—the termination of a lease—no occasion having arisen for its exercise at such a time. The presumption of law would be that the tenant-

right of the respondent's estate is in this the same as on the adjoining estates; and if there is a difference it lies on the respondent to show it. We allege the custom of continued occupation at a fair rent, or if the landlord objects, the right of sale, or compensation as if so sold.

KEOGH, J.—But there is a covenant in the lease, which, in my opinion, almost excludes any custom of that kind.

*Donnell*—That covenant is not inconsistent with the 4th section; how, then, can it be inconsistent with the 1st?

KEOGH, J.—Can there be an earthly doubt that at the time that lease was made Fox and King had no earthly claim to the land?

*Donnell*—Legally we had no claim.

KEOGH, J.—And you are now claiming that the landlord shall pay back to you all the rent you paid to him during the time you occupied the lands, with 80 per cent. additional.

*Donnell*—We don't ask one penny of compensation if we are allowed to remain in possession at a reasonable rent, or if we are allowed to sell. We offer a largely increased rent—a fair rent, equal to that of the respondent's yearly tenants.

KEOGH, J.—You must show to me by evidence that there is a custom when a landlord makes a lease of twenty-one years to a stranger, that that stranger under the custom has a right, on the expiration of the lease, to sell or get compensation.

*Donnell*—That is impossible. Only two such leases were granted; and this is one of the two. If a custom existed by which the tenant under leases generally was entitled to tenant-right compensation, or had a tenant-right interest, that custom, now made retrospectively a local law, is as much a part of the contract as if it had been written in it; and if there is anything special in the lease to exclude the custom, it is for the respondent to show it.

KEOGH, J.—You must give me proof bearing on the custom as applied to this holding. It is for you to show that the terms of the lease of 1851 can be put an end to by a vague general custom. Let me have proof of the custom.

Samuel Burns, the claimant, was then called, and examined. He stated that it was the custom on the Cuppage estate when leases expired to get them renewed at a fair rent. To turn out a tenant when the lease expired would be a violation of the custom. The witness was proceeding to give evidence of the custom on the adjoining estates, when

KEOGH, J. said—That will not do. You must prove the custom in this townland.

*Hamilton, Q.C.*—There are no less than eight townlands on the Cuppage estate.

*Donnell,*—But there were no sales in that townland. There could be none.

KEOGH, J.—Were you offered a lease by the Earl of Ranfurley in the same way as other tenants?

Witness—Yes; but at a higher rent.

*Donnell*—The other tenant who took the farm under lease chose to forego his right. That is not to prejudice us. He might not have known, or he might not have cared to go to law for his rights.

Mr. Diver, agent to extensive estates in the district, deposed that the custom existed at the end of a lease; and that the leaseholder was then entitled to tenant-right.

KEOGH, J.—I may tell you I am prepared to hold that the covenants\* in this lease exclude the custom.

\* The lease contained the following covenants:—

Covenant to leave and yield up the lands demised with all improvements.

Covenant "not to sell, alien, sublet, assign, or demise any part of the said premises without the license of [the lessor] under seal; or if the estate or interest of [the lessees] shall upon or after decease either by testamentary disposition or otherwise become vested in or in trust for more than one person, then unless such persons respectively (being then or thereafter of competent disposing power) shall and 'do at their expense, on the request in writing of [lessor], assign all their estate and interest so as that the same may be legally and beneficially vested in one person; Or in case any house or building other than the present mansion house (to be inhabited by one family only) shall be erected or built, or being now built or erected, shall be used or occupied on the said demised premises, for the use of, or be inhabited or occupied by any cottier, labourer, &c., without the consent in writing of [lessor], and then only for such period of time as shall be expressed or mentioned in such consent. Or in case [lessees] shall not in all things perform the covenants herein contained, these presents shall become absolutely null and void.

Covenant of Re-entry—

PROVIDED in case of assignment by any sheriff, or in bankruptcy, or otherwise by operation of law, such persons, &c., shall hold on same conditions, &c. as [original lessees].

[Original lessees] to hold as joint tenants . . . and that it shall not be lawful for them to assign save as hereinbefore provided, nor to sever, nor sue out writ of partition, any law, usage, or custom to the contrary notwithstanding, provided that nothing herein contained shall be construed to prevent the said [lessees] from assigning or demising the whole of the said premises to some one person who shall occupy the entire thereof.

*Donnell* asked his Lordship to reserve a case.

KEOGH, J., on the following morning delivered judgment :—After recapitulating the facts of the case, his Lordship said that, if Mr. Burns got the £700 claimed, that would be £300 more than the whole amount of the rent which had been paid in the twenty years the lease had existed. He had been offered by Mr. Newton, the respondent's agent, to be continued on at an increased rent, on a new lease, excluding the tenant-right, on exactly the same terms as had been offered to, and accepted by the adjoining tenant on the fall of his lease. He had refused that offer, saying he would take his chance of establishing his legal rights, and if he failed in that, he was willing to accept the landlord's terms. The landlord refused that proposal, and had since let the land to another person. He had had the opportunity of conferring with Judge Lawson, and he had also since read a treatise by Mr. Donnell on this very question—the leasehold tenant-right,\* and he agreed with the conclusion of the writer, that there was nothing to prevent the tenant-right custom existing along with a lease. But that custom must be proved, and herein the claimant had failed. No evidence had been given from that portion of the Ranfurley property—the Cuppage estate, of which this holding forms a part. Evidence was given from other estates, some of them a long distance off, that on the fall of leases the custom or practice had been to continue the tenants in occupation at fair rents, or that they would be allowed to sell, but the custom may have been conceded by those leases. I cannot consider that to be proper evidence, unless those leases are before me—the circumstances may be quite different. Besides, this lease was not given as a continuation of a tenancy. The original lessees, whatever equitable claim they might have, were strangers to the estate. The lease was got for a specific purpose, and to recoup a specific loss. His Lordship having read the covenant in the lease to deliver up the land, with all the improvements thereon, and the special covenants against alienation, said that they were at variance and inconsistent with the custom. I thoroughly agree in the arguments put by Mr. Donnell in this work, that there is nothing in an ordinary lease more than a tenancy from year to year, to exclude the custom, if the custom is proved. It may exist, but it has not been proved to exist in this case. I turn to the chapter in Mr. Donnell's book, chapter 6, on proof of the leasehold tenant-right, and I find that though he sets out six different modes of proof of this custom, he nowhere refers to proof from adjoining estates.† I therefore,

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\* The preceding chapters of this work, which were then separately published.

† This question was discussed in a separate chapter. See *ante*, Chap. v., p. 133.

and with the concurrence of Judge Lawson, dismiss this claim, and I refuse to reserve any question.

*Donnell* applied to his Lordship to remit the claim for improvements to the Chairman, to inquire what compensation should be paid to the claimant under sec. 4.

His Lordship made an order to this effect.

### STEVENSON v. EARL OF LEITRIM.\*

*Effect of agreement of letting, with clause restraining alienation, signed by tenant but not signed by landlord—Case reserved.*

The facts of this case are fully stated in the report of the case before the Chairman, which see *post*, p. 283.

LAWSON, J., after hearing the evidence similar to that given before the Chairman, said—As an important question of law arose upon this agreement, if the parties were agreed upon the facts, he felt disposed to reserve for the opinion of the Court for Land Cases Reserved, the question—whether this agreement affected the tenant-right, and disentitled Mr. Stevenson to the benefit of the custom. Subject to this question of law, which arose upon the agreement, the decree of the Chairman would be affirmed. He was of opinion that the agreement did not disentitle Mr. Stevenson to his tenant-right, but he might perhaps change his opinion on that point on hearing the case fully argued in the Court of Land Cases Reserved.

### MICHAEL FRIEL v. EARL OF LEITRIM.†

*Effect of subdivision on tenant-right. Point reserved.*

This was an appeal from the Chairman, who had dismissed the claim on the ground that the tenant by subdividing had forfeited his tenant-right.

\* Land Appeal, Lifford Summer Assizes, 1872; before Lawson, J.

† Land Appeal, Lifford Summer Assizes, 1872; before Lawson, J.

Michael Friel, the claimant, held a farm of about 10a. 3r. 10p., under the Earl of Leitrim, at a rent of £5 a-year. He also held another farm, but by mistake it was not included in the claim. His father, George Friel, had held it before him, having inherited part of it from his father, claimant's grandfather, and having purchased the rest by a tenant-right purchase from one Patrick Carr. A few years previous to his death, which occurred in 1865, he divided this farm between his two sons, Michael (the claimant), and Daniel, who from that time continued to occupy the farm separately, and lived in separate but adjoining houses. The receipt continued to be given in the name of George Friel, even after his death, and until 1868; from that time in the name of claimant, sometimes as representative, and sometimes as son of George Friel. In the year 1871 Daniel was ordered by the respondent to leave the farm, on the ground of subdivision not being allowed; and on his declining to do so, an ejectment was brought, and he and claimant turned out of possession in December, 1871. The claimant thereon filed his claim.

*M'Causland*, Q.C. (with him *M'Conchy* and *M'Laughlin*), for the claimant, proposed to give evidence of the tenant-right custom having existed on respondent's estate up to the time of the present Earl having come into possession, in or about the year 1854. His Lordship thereupon intimated that he would not require such evidence to be repeated in this case, as it had been proved before him in the case of Hugh Friel at the last assizes that tenant-right had existed until the time of the present Earl having come into possession, and that the respondent had proved that since he had come into possession he had always refused to allow any right of sale of the tenants' interest. He would, therefore, assume that that evidence applied to this case, unless some quite different evidence could now be given him.

Counsel for the claimant then stated that they would only give evidence of the value of the farm and the sea-weed appurtenant thereto; which was done.

*H. Holmes*, for respondent, then called

Mathew Stewart, a clerk in the rent office:—It was a strict rule on the estate to prevent subdivision, and it was the duty of the bailiffs to report such cases.

The Earl of Leitrim deposed:—Since 1854 he had made it an

inflexible rule to prevent subdivision or subletting. During that time no tenant-right custom had been permitted. If any tenant sold his interest to another, he would evict the parties.

*Holmes* submitted that the subdivision in the present case disentitles the claimant to any compensation, and cited *Armstrong v. Ellis* (6 I. L. T. R., 63; see *ante*, p. 195).

*McCausland*, Q.C., cited *Fleck v. Lord O'Neill* (*ante*, p. 188), from the proof sheets of Mr. Donnell's Land Reports, then in press.

*LAWSON*, J. said he would reserve the question of the effect of the subdivision for the Court of Land Cases Reserved.

Counsel for the claimant asked leave to give evidence as to subdivision having been allowed on the estate previous to the present Earl's time. His Lordship having allowed such to be done, it was arranged that the evidence would be taken at Londonderry.

On a subsequent day at Londonderry, counsel called

Michael Martin, who stated that he had been born on Lord Leitrim's estate, and knew all the customs existing on it before the present Lord's time. Up to some twenty-eight years ago the lands were held in rundale, and an unlimited right of subletting and subdivision existed. The office made no objection to either so long as the rent was paid. About twenty-eight years ago the land was cut up into separate holdings, and rundale was abolished. From that time subdivision was prohibited, but the sale of the tenants' interests was permitted as freely as ever, and encouraged. He knew instances of this having occurred in his own family. His father, James Martin, gave one-half of his farm to his son Daniel on his marriage. Daniel afterwards died, and left his portion to his brother-in-law, Edward Shiel, as a trustee for his children. The office objected to this, and his father had to buy back this portion from Edward Shiel. This was done with the full knowledge of the agent. Witness afterwards came into this farm himself, and sold it with the permission of the office to one Owen Kelly. Could give another instance. Another brother of his, Charles Martin, married one Widow Gallagher, who had a farm in right of her former husband. When her son, by the first husband, grew up, he got a portion of the farm. Mr. Wray, the agent, objected to this; and allowed Charles Martin to buy up the part his stepson had. Both these instances were subsequent to the cutting up of the land.



Owen Begley proved that he had been a tenant on the estate previous to the present Earl's time. He had been appointed by the Hon. Mr. Clements, the present Earl's brother, to arbitrate in all cases of tenant-right sales where the parties could not agree on the amount, and had been paid a small salary for doing so. He knew that before the land was cut up about twenty-eight years ago, an unrestricted right of sale and of subdivision of the tenants' interests existed; and that the "office" did not care so long as any one paid the rent. After the land was cut up subdivision was prohibited, but the sale of the tenants' interests continued just as freely as ever, with the full consent of the office. He could give many instances of sales being allowed where the land sold had been subdivided.

Murrough Carr divided his farm, and his son, Owen Carr, held one-half, and Pat Fealty the other half. This was objected to by the office, and Pat Fealty sold his portion to Owen Carr.

Sarah Shiels held one portion of a farm, and Edward M'Fadden the other. Sarah Shiels sold her part to M'Fadden.

Daniel M'Allister and Michael Carr each held one-half of a farm. This was objected to, and Michael Carr bought up the whole. The money was paid through one of the bailiffs, M'Ateer.

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#### HUGH FRIEL v. EARL OF LEITRIM.\*

*Where the case had been dismissed by the Chairman on the ground of subdivision, but no subdivision had, in the opinion of the Judge, taken place, the case will be remitted to the Chairman, to rehear it on administration being taken out to the deceased tenant.*

Hugh Friel, the maternal grandfather of the claimant, had occupied a farm of about 22 acres on the then Earl of Leitrim's estate, and previous to his death divided it and gave one-half to his son Neil, and the other to his daughter Giley, who was married to one Owen Friel. At that time subdivision was recognized on the estate, and the receipt for the one-half was given to Neil Friel

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\* Land Appeal, Lifford Summer Assizes, 1872; before Lawson, J.

jointly with his father Hugh, and the receipt for the other to Owen Friel in right of his wife. The present claim only related to the former half. From the death of the old man, 35 years ago, the receipt for this was given in the name of Neil Friel, who alone was recognized as the tenant, although a sister of his, Bridget, and her husband, one Carr, claimed and occupied a portion of it. This portion Carr sold to Owen Friel, the husband of Giley, and the claimant as their eldest son claimed to be entitled to this part. Neil the tenant died about eight years ago; and another of his nephews, John, a younger brother of claimant, claimed in right of a parol devise of his uncle Neil. Since Neil's death, the two brothers, Hugh the claimant, and John, continued to occupy the farm, each paying one-half of the rent, but the receipt still continued to be given in the name of the deceased tenant Neil. Both were served with notice to quit, and turned out of possession. The existence of the custom as in the previous case was assumed.

*M'Causland*, Q.C. (with him *M'Conchy* and *M'Laughlin*), for the respondent, applied that administration to Neil for the purposes of the Act should be granted to the claimant, his brother John being a concurring party to the claim.

*Holmes*, for the respondent, contended that his lordship had no power to do so, and that the subdivision of Neil's farm between the claimant and John barred any claim being made.

LAWSON, J. said that he did not consider this a case of subdivision. It was admitted that the deceased man, Neil, had been the tenant; and the respondent had since his death recognized no one as tenant. The objection now made to Hugh Friel's claim would equally apply if his brother John, or any other of the next of kin, had filed the claim. He would remit the case to the Chairman with directions for him to entertain the claim, provided that administration was in the meantime taken to the tenant, Neil Friel.

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#### JAMES DOOLIN v. EARL OF LEITRIM.\*

*Unreasonable conduct—Effect of agreement on the part of the tenant.*

The claimant formerly held his land under the respondent in

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\* Land Appeal, Lifford Summer Assizes, 1872; before Lawson, J.

rundale along with two other tenants, Fergus Friel and Grace Doolin. About two years ago the respondent cut or squared these farms, and allotted a distinct portion to each, the claimant signing an agreement similar to the one in *Stevenson v. Earl of Leitrim* (see *ante*, p. 206, and *post*, p. 283). He refused, however, to go into possession of this new portion on the ground that the portion he was to get was much worse than what he formerly held, and was the highest and most mountainous part of the land, while his rent was raised from £4 10s. to £6 10s. a-year. Ejectment proceedings were then taken against him, which he defended successfully. Ultimately, however, an ejectment decree was obtained; on which the present claim was filed, and the Chairman gave a decree for £100, making a large deduction for what appeared to him unreasonable conduct. Both parties appealed. The claimant still continued in possession.

*M'Causland*, Q.C. (with him *M'Conchy* and *M'Laughlin*), called witnesses to prove the above facts and the value of the farm, the existence of the custom not being further contested, as in the two previous cases.

*H. Holmes*, for the respondent, contended that the claimant was guilty of unreasonable conduct in not going into possession of the new farm, and in vexatiously defending the ejectment proceedings, which should be taken into account in measuring the amount of the compensation, if his Lordship was of opinion that the decree should be affirmed. If the decree should be affirmed, he would ask the same point on the agreement to be reserved as in *Stevenson v. Earl of Leitrim*.

LAWSON, J. said that under the circumstances he did not consider the conduct of the claimant unreasonable. On the evidence of the surveyor it appeared that the claimant would be entitled to fourteen years' purchase of the profit value of the farm, which was proved to amount to £10 16s. a-year. He would give that amount, viz., £151 4s.; and would reserve the question of the effect of the agreement in this case also.

It was subsequently arranged that his Lordship should hold back his decree until *Stevenson v. Earl of Leitrim* was decided in the Court of Land Cases Reserved, to avoid the expense of arguing this case also; and then decree for the above amount or dismiss, according to the decision in that case.

## WALLACE v. M'CLELLAND.\*

*The respondent must show, as a matter of fact, that subletting or letting in con-acre destroys the tenant-right. The 18th sec. enables the Judge to consider the equities, but they must be shown to be equities under the Ulster custom.*

This was an appeal from the decision of the Chairman who dismissed the claim (see *post*, p. 259, where the facts are fully stated). Additional evidence was now given of sales of the tenant-right interest at the expiration of leases in the immediate neighbourhood.

Francis Mulligan deposed to selling, as executor of a deceased tenant, who was the last life in the lease, the tenant-right interest in a farm at the expiration of a lease. Tenant-right exists whether there is a lease or not.

BARRY, J.—Supposing at the expiration of a lease, the landlord wants to take up the land himself for some particular purpose, would he be obliged to give the tenant, on the expiration of a lease, the same as would be brought for it by auction?

Witness—He would not be willing.

BARRY, J.—But, in your opinion of the custom, would he be compelled?

Witness—I hold under Mr. White myself, and Mr. Lindsay held a farm on my march, and Mr. White wished to take it himself, and, after being exhausted for three years, he gave £20 an acre for it. It would have brought £25 or £26 if not exhausted.

BARRY, J.—You mean that a landlord is not considered as violating the custom if he gives something substantial, though less than the amount it would bring in the market?

Witness—That is just the case, though the tenant might grumble.

George William Beck gave similar evidence.

James Sharman Crawford, J.P., deposed that his brother had property in the southern end of the county, within a mile and a-half of Mrs. M'Clelland's property. He was a landlord himself of considerable property in the neighbourhood of Crossgar, in the same county, and was generally acquainted with the management of land all through the county. He had always understood that tenant-

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\* Land Appeal, Down Summer Assizes, 1872; before Barry, J.

right exists with a lease as without it. In his case the practice was exactly the same. He always gave a tenant liberty to sell on condition that he got a solvent tenant.

BARRY, J.—Have you known of a sale on the termination of a lease? I have known of cases where leases were surrendered to me and the tenant-right sold for the benefit of creditors. I have also known cases where the tenant under a lease was ejected, and the tenant-right afterwards sold. From my knowledge of the custom I am able to say that it would be a violation of the custom to eject a tenant at the expiration of his lease, without allowing him tenant-right. In fact, the lease makes no difference.

BARRY, J.—Have you ever known of any tenants getting leave to sell if they neglected their lands? I did, my Lord. We have frequently urged neglectful and bad tenants to sell for the purpose of getting rid of them.

BARRY, J.—But no matter what the management, were they permitted to sell? Certainly, my Lord; in fact, we compelled the bad tenants to sell.\*

To *Frazer*—My brother does not grant leases.

*Donnell*—But there were formerly leases and sales effected on their termination? Yes.

Several witnesses deposed that the land was in good condition.

*Frazer*, for respondent, submitted that tenant-right could not exist at the end of a lease which had existed for 82 years. The covenants in the lease to plant and reside had not been observed; the tenant had sublet; and the Landed Estates' Court conveyance declared that the only right to which this holding was subject was the lease of 1790.

BARRY, J.—You must show me, as a matter of fact, that subletting or letting in con-acre destroys the tenant-right. The 18th section allows me the fullest latitude in considering the equities,

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\* Mr. F. Filgate, agent of the Marquis of Downshire, was asked by the Chairman of Lord Clanricarde's Committee, 1867—“Supposing a tenant comes in and pays, say £50, for the good-will of a farm, and at the end of five years he very much deteriorates the condition of the farm, would you allow him to take as large a sum as he gave?” He answers—“We have nothing to do with the sum he gives, or with what he gets. The probability is that he does not get so much, and that is one cause of safety in tenant-right; that if the tenant does injure the farm by undue culture, it is his own loss”—(*Digest of Evidence*, Q. 2,032).

but you must show me this is an equity I am entitled to go into under the tenant-right.

Mrs. M'Clelland, the respondent, deposed that since 1863 the tenant had without her consent sublet, and no manure had been put upon the land.

A witness deposed that the land was very much exhausted. It appeared neglected, and was overrun with weeds. The fences were, however, very good.

*Donnell* submitted that the custom to which these lands were subject was the custom at the time of the letting—that ancient custom is to be presumed from the evidence of the old witnesses examined, who deposed to a tenant-right, whether the land was under lease or not. The dealings, in recent years, of Mrs. M'Clelland, a purchaser in the Landed Estates' Court, could not affect the present claimant. The Act in sec. 1 does not speak of usages of estates; though in the general provisions of the Act, sec. 6 speaks of "practice on the estate," and sec. 13 of "practice prevalent on the estate." The omission in sec. 1 shows that the Legislature in dealing with the Ulster custom did not contemplate usages of estates or usages prevalent on estates—but the usages prevalent in the province of Ulster, recognized not as individual acts, but as "the authoritative traditions of the district."

His Lordship reserved judgment.

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#### WILLIAMSON v. EARL OF ANTRIM.\*

*Andrews*, Q.C. (with him *Donnell*), for the claimants:—The holdings in question are situated in the vicinity of the town of Ballymoney, and had received the name of, and certainly for a long time had been regarded as town-parks; and one of the questions that would be submitted on the other side to his lordship would be that, the lands being town-parks, the fifteenth section excluded the operation of the Ulster custom, and that, therefore, the claim under it could not be sustained. One of the denominations or

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\* Land Appeal, Belfast Summer Assizes, 1872; before Barry, J. See report of case before Chairman, *post*, p. 307.

holdings was in the possession so long ago as 1850 of one William Williamson, the grandfather of one of the present claimants. It appeared that William Williamson sold his holdings to his son, Peter Williamson, who was the father of the William Williamson mentioned in the claim, and succeeded his father in the interest in the holdings. The tenancies were yearly tenancies, as most of those around that neighbourhood were, being town-parks. William Williamson, the appellant, who came into occupation of these holdings about 1865, recently became embarrassed in circumstances, and upon the 12th May, 1871, he executed an agreement, which was virtually a mortgage of his interest in those premises, to a Mr. John Hughes, which accounted for that name appearing in the claim; and his embarrassments continuing, and having become still more pressing, he executed, on the 20th of September, 1871, a formal assignment in favour of his creditors, which covered the two holdings in question, and the trustees to whom it was executed were the other persons named in the claim, and who were to realize the property passed under it, and to distribute it in the usual way. The trustees proceeded to advertise a sale on the 9th of January of the present year. Contemporaneously with the sale, a notice was served by the solicitors of Lord Antrim, by which they forbade the sale, and in that way, as he (counsel) conceived, acted in violation of the tenant-right which the claimants said applied to the premises in question. The notice was as follows:—"Sir, whereas you have advertised for sale on Tuesday, the 9th day of January, 1872, the tenant-right of certain fields forming part of the Ballymoney town-parks, held by the representatives of William Williamson and Peter Williamson, under the Earl of Antrim, without the consent or permission of the said Earl, now we do hereby, as solicitors for said Earl, give you notice that he will not acknowledge the sale of these fields, same being town-parks, nor accept the purchaser; but, if the tenant voluntarily wishes to quit the same, he will allow him whatever sum (if any) is paid as fine by the tenant, with the consent of the landlord or his agent, and any claim for unexhausted improvements, or other equitable claim for compensation the tenant may be able to show." That notice having been served, the sale was proceeded with notwithstanding, because the persons conducting the sale conceived it their duty to realize the amount of the property, as they had the conviction that the tenant-right custom

applied to these town-parks, and that from time immemorial there had been a trafficking under it. The sum produced by the sale was, in consequence of this notice, very inadequate, and much under the ordinary tenant-right value of the property. The price received was about £72; but that was under the chilling influence of the notice forbidding the sale. The buyers were Messrs. Thompson and Todd, highly respectable persons residing in Ballymoney; and he believed these persons were in actual occupation. Subsequently, the Earl of Antrim, conceiving he was entitled to disregard the sale, served a notice to quit, and the case now came before the Court to determine whether the Ulster custom applied; and, inasmuch as the Earl of Antrim would not allow it to be carried out, to award such a sum as would be fair to those persons who have the interest in the tenant-right. The Chairman, after a deliberate consideration of the case, came to the conclusion that town-parks were as susceptible of tenant-right as any other kind of lands. Having regard to that branch of the 1st section, which says—“Where the landlord has purchased or acquired, or shall hereafter purchase or acquire, from the tenant the Ulster tenant-right custom to which his holding is subject, such holding shall thenceforth cease to be subject to the Ulster tenant-right custom,” the Chairman thought that, inasmuch as there was some suggestion or proof—he could not find which—that at one time the landlord had taken the holdings, or some of them, into his own hands, and had them for some time, even if this custom did apply it was absorbed; therefore, the lands, when again let, were discharged of the custom, because they had been acquired within the meaning of that clause. There had been instances frequently of sales having taken place of these town-parks, though recently Mr. M'Donald, the present agent, had been endeavouring to restrict it. There was no indication in the 1st section that the Ulster custom was to be mutilated, or that town-parks were to be excepted. The 15th section seemed to point out cases in which compensation was not payable; but compensation was not necessarily the only relief which the tenant was entitled to claim under the Ulster custom. The fourth form, which might be deemed part of the Act, said—“The said defendants claim to be entitled to the benefit of the following tenant-right custom, &c., or claim the following sum due to them for compensation.” It was present to the minds of the framers of the forms, having regard



to the Act, that there might be a claim for the benefit of the custom as distinguished from a claim made for compensation, and this might readily arise on the refusal of the landlord to recognize that the tenant was entitled to the custom, when the latter might come to Court and ask for an attachment against the landlord for refusing him the benefit of the right. Therefore, on the construction, the meaning, and the principles of the Act, even without any authority, the 15th section could not be reasonably held as applying to the 1st section, and it was clear that town-parks, if shown to be subject to the custom before the Act was passed, were still as much entitled to the benefit of it as any other land—that was the opinion of Mr. Otway in the present case, and in that of *Fleck v. O'Neill*, and also that of Mr. Bland in a case of *M'Gaghey v. Stewart* (*post*, p. 299). As to the second point on which the case had been dismissed—that the acquisition merged the custom, and on the landlord taking up the lands the right was absorbed—he would say, that, if that were allowed, it would go far to abolish the custom altogether. The change from one tenant to another was the nicest form of surrender. A tenant sells to another who is unobjectionable to the landlord, and the latter accepts him. The previous tenant thus surrenders possession to the landlord, who must take up possession before he hands over the land to the new tenant. That was a clear and undeniable surrender, and as the length of interval during which it remained in the landlord's possession was of no consequence, the custom would not be found to exist at all in the province, for every tenant-right sale in it took place in that way, and involved a surrender.

BARRY, J.—By the strict rules of law you would find it difficult to make out any custom at all but, then, it is not to be tested by such.

Andrews, Q.C., said, certainly the construction should not be taken in any way to defeat the provisions of the Act, or render it a dead letter. If a construction of the Act was arrived at by an accurate consideration of strict legal principles, it might involve them in the results of defeating its objects, and the Land Act was an Act made to be worked, not to be defeated. Not alone did the acquisition not abrogate the custom, but length of possession itself gave a claim under the custom, and a tenant paying for a holding from year to year, after possession for a considerable length of time,

would be considered by the strictest exponent of the custom as being entitled to it. The tenant-right is annexed to the tenancy, and created on its very formation ; and in a tenant-right district, on the forming of the relation of landlord and tenant, the custom annexes itself to the land.

**BARRY, J.**—Suppose a landlord purchased a tenant-right, and then lets without any express exclusion of the tenant-right, what would be the results of the Act ?

*Andrews, Q.C.*—I would even think in that case, if the landlord did so in a district where tenant-right exists, the holding would be again subject to it.

**BARRY, J.**—That is pushing it to its fullest length ; for without this clause of the Act the landlord can exclude the tenant-right by express agreement, and if that agreement was necessary the clause would not be required.

*Andrews, Q.C.*—If the landlord lets without reference to the right, and it still is allowed on the estate, the holding may become subject to it again. If a landlord buys off all his tenants and replaces them, there is nothing to prevent the estate becoming a tenant-right estate in the next year, either by express declaration or by implication. The right would spring up again in the holding, under certain circumstances. Time after time the landlord takes the land into his own hands, still, when he lets it again, the tenant-right attaches to it.

**BARRY, J.**—Would the case of a landlord purchasing the tenant-right from a tenant, and yet leaving him in possession, meet the meaning of the word “acquire” in the clause ?

*Andrews, Q.C.*—That would satisfy the language of the Legislature, and a case of the kind would be a sufficient interpretation of the language without going into the nice question of surrender from one tenant to another through the landlord. The mere getting up of the land by the landlord into his own possession was not an acquisition of the custom within the meaning of the Act. It is not the taking up of the land, but the acquiring of the right, that destroys the custom. If the landlord takes up the land he is merely taking up his own ; but, in acquiring the right, he buys something the tenant had got against the interests of the landlord.

**BARRY, J.**—Mr. Butt is of opinion that the acquisition of possession by the landlord is the acquisition contemplated by this case.

He says when once the holding comes into the landlord's hands it is discharged of any claim under the custom, which will not apply to any future letting of the holding.

*Andrews, Q.C.*—That is the argument of an able man and no more.

*BARRY, J.*—I merely gave it as such. It is not enough that a landlord makes a new letting or has the lands in his own hands, but he must have it in his own hands untrammelled by any obligation whatever in the way of right to compensation.

*Falkiner, Q.C.*, for respondent—We take the copyhold analogy which exactly exists here. The moment a landlord gets a copyhold into his own hands it is destroyed.

*Andrews, Q.C.*—The custom is not a tenure like the copyhold. It is an incident of the tenure.

*BARRY, J.*, said copyhold was a tenure distinct from the common law tenure, and tenant-right was an incident to the common law tenure.

William Young, builder, Ballymoney, examined by *Donnell*—Tenant-right existed in relation to the town-parks in that neighbourhood. The custom was, that a man, when he wished to sell, sold, and thereafter the seller and the purchaser had the sale confirmed; and he never knew an instance of refusal. Under ten agents he had known that custom to exist. His recollection existed over fifty years. He had sold in accordance with that custom himself; and he had purchased town-parks as well. He purchased a town-park in 1857, and sold it again in 1862. The sale was quite free on both occasions. He knew cases where the tenant became insolvent, and the creditors sold the tenant-right—he remembered two cases. Witness's father surrendered a field to the landlord about fifty years ago; but he got back the field subsequently from Lord Antrim's agent. Witness had since sold the field, in 1859, and it has frequently changed hands since then.

*BARRY, J.*—Do you think, supposing a tenant gets land from the landlord, and buys nothing, is he in the same position as the man who buys the tenant-right?

Witness—I have known sales of land—the land sold and rightly—for which the original holders paid nothing. It was the custom to sell that which was got for nothing, without restriction.

Cross-examined by *Falkiner, Q.C.*—He never knew any inter-

ference with sales by auction of these town-parks. He believed the agent, Mr. M'Donald, was acquainted with these transactions.

James Cameron, examined by *Andrews*, Q.C.—He remembered the town-parks of Ballymoney for about fifty years, and he recollected some of them having been taken up by the landlord, and afterwards given to tenants. Sales afterwards took place of these town-parks. He had purchased land which had been so taken up.

Neal Lamont, examined by *Donnell*—He got a town-park out of Lord Antrim's office for nothing, and a part of it was afterwards sold to Mr. Cameron, the previous witness.

Other witnesses gave similar evidence.

*Falkiner*, Q.C., for the respondent, said that if there was a clear point of law in the case under the Statute it was that the 15th section of this Act of Parliament excluded from compensation, under the provisions of the Act, "any demesne land or any holding ordinarily termed town-parks." He did not think that his lordship would have a shadow of doubt upon this point, and he was going to show that nothing but compensation to tenants runs all through the Act.

BARRY, J.—And do you, therefore, hold, under this same 15th section, all pastoral lands in the North of Ireland are excluded from the provisions of the custom by Act of Parliament?

*Falkiner*, Q.C., held that the law in the 1st and 2nd sections was compensation, and not specific performance.

BARRY, J.—Your position is that a judge has no power to give anything but compensation in a money decree?

*Falkiner*, Q.C.—It is.

BARRY, J.—Then, what is the meaning of this section:—"Any order made under this Act may be enforced by attachment or otherwise, in the same manner as if it were the order of any of the superior courts of common law at Dublin; and if such order be for the payment of money, it may be enforced," &c.? Does not that contemplate something else except money? Do you ask me to hold that tenant-right is destroyed in the North of Ireland in every farm let wholly or in part for the purposes of pasturage?

*Falkiner*, Q.C., said he certainly must go that length. The 1st and 2nd sections, which refer to the legality of the Ulster tenant-right custom, are headed "law of compensation to tenants," and the 15th section must include these as well as the others—"No

compensation shall be payable under the preceding provisions of the Act in respect of," &c., "any holding ordinarily termed town-parks." What was the Act passed for? For the benefit of the ordinary occupiers of land in this country. Would his lordship hold that the 5th sub-section, under section 15, does not exclude any cottage allotment not exceeding a quarter of an acre?

BARRY, J.—If it were proved to me that the tenant-right custom applied to cottage allotments, the same question would arise as here. The intention of the Act was to carry out the custom of Ulster intact, which a very intelligent witness in Down described as that sanctioned by public opinion.

*Falkiner, Q.C.*—Is it to be attached to a cottage allotment or a labourer's holding?

BARRY, J.—Not if it did not exist previously.

*Falkiner, Q.C.*, said the 15th section appeared to him to be carefully drawn, and if a liberal construction was to be given to the clauses which seemed to be in favour of the tenant a liberal interpretation should also be given to those which seemed to be in favour of the landlord.

BARRY, J.—You argue that there is no power to make a decree for anything but money. That is the whole question under section 15; and you also hold that, if at any time the landlord takes the land into his possession, a re-letting does not subject the land to the custom.

*Falkiner, Q.C.*—Yes; and if there is a claim it must be under the other sections of the Act. The mere fact that the landlord has allowed sales to take place afterwards does not re-establish the custom.

BARRY, J.—Irrespective of the time and the number of dealings?

*Falkiner, Q.C.*—I think so.

BARRY, J.—Supposing that sixty or seventy years ago the holding came into the possession of the landlord, and that he then let, and that ever since sale upon sale was carried out, can he turn round and say that the land is not subject to tenant-right? That would be a very strong statement.

*Falkiner, Q.C.*, said his lordship had put the case in a very strong light, but that was the true test, and he would say "Yes."

BARRY, J.—That is, since the thing has been destroyed the custom cannot be re-established either by implication or by express contract.

Alex. M'Donald, J.P., deposed that he had been agent for Lord Antrim since 1863. When appointed he found that sums of money had been paid for town-parks, and he referred to Lord Antrim for directions, and was directed to restrict it to the amount of the fine which had been paid by the former tenant. He only allowed the outgoing tenant to sell for what he had paid himself. There had been thirty or forty transfers of town-parks since he became agent, and in nearly all cases they were dealt with in the way he had said. There were one or two exceptional cases—one case in connexion with the Presbyterian congregation, and the other the Roman Catholic body.

BARRY, J.—You allowed the religious bodies to pay more?

Witness—Yes. In the other cases I would not allow them to pay more, unless the parties receiving it had made permanent improvements. I have frequently prohibited sales of tenant-right.

Alexander Cuthbert deposed that the lands of the Croft (one of the holdings claimed for), were vacant in 1844, and Williamson took them from the office.

James Hanna, a former agent, deposed that the former tenant of Castlebar (the other holding claimed for), surrendered to witness the lands, and he afterwards let them to Williamson, and part to Davidson. No dues were charged.

To *Andrews*, Q.C.—Davidson's field afterwards came to Williamson. I don't believe he paid Davidson anything.

*Orr* having replied for the respondent, and *Donnell* for the claimants—

BARRY, J., said the case had been very well argued. Any remark he had made in the case was not because his mind was biassed in the least degree on the one side or the other. He wished to get as much information as he could, and he would consider carefully the whole case, and Mr. Otway's judgment, before giving his decision.

His lordship subsequently reserved a case for the Court for Land Cases Reserved.

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#### JOHNSTON v. TORRENS.\*

*Andrews*, Q.C. (with him *Donnell*)—On the 13th September, 1844, a lease was executed between the Hon. Chichester Thomas

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\* Land Appeal, Down Summer Assizes, 1872; before Barry, J. See report of case before Chairman, *post*, p. 257.

Skeffington of the 1st part, John M'Connell of the 2nd part, and Malcolm Johnston, the husband of the claimant, Margaret Johnston, of the 3rd part, who left to her by his will everything of which he stood possessed. He made his will upon the 31st of March, 1862, and died upon the 29th of May, 1866. The interest of Mr. Skeffington had become vested in the respondent, Mr. Torrens, and Johnston's lease had expired. The lease showed that tenant-right had been paid by Johnston to M'Connell, his predecessor, for these premises. It recited that M'Connell had held as yearly tenant, and that a sum of £119 18s. 11d. was due to the landlord for rent and costs, and that on payment of this sum by Johnston the lease had been granted. Robert M'Connell, the father of John M'Connell, in the year 1838 held as tenant from year to year the same premises in Ballynafeigh, and other premises, which made in all  $22\frac{1}{2}$  acres. and he entered into an arrangement for the sale of part of it. There were all the requirements of a tenant-right sale between M'Connell and the person to whom he disposed of  $6\frac{1}{2}$  acres of it—Richard Malone Sneyd—and the price was a substantial one—£200 for the  $6\frac{1}{2}$  acres.

BARRY, J.—Was the landlord aware of it?

*Andrews* said he was, and he subsequently received the rent from Sneyd, and recognized him as his tenant. The agreement between Sneyd and M'Connell recited that the £200 was paid for M'Connell's tenant-right in the premises. Mr. Johnston's lease having expired, and Mr. Torrens refusing compensation—the case came before the Chairman of Down; and he, not being satisfied on the evidence before him that the tenant-right custom applied to this particular of holding, dismissed the claim. It would be shown that the tenant-right custom existed in the surrounding district on the expiration of a lease. They would prove the general usage, such as they proved at Downpatrick,\* and strengthen the case made before the Chairman by the evidence of other witnesses. They would bring the tenant-right up to this very door and this very holding; so that his lordship, he thought, would be constrained to hold that tenant-right existed at the end of a lease as at the end of a yearly tenancy; and that, if the landlord wishes to take the farm

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\* *M'Nown v. Beauclerc*,<sup>5</sup> the general evidence as to the custom in which was, by consent, taken as applicable to the present case.

into his own hands, the tenant can come to him for what is fair. His lordship, he was sure, would have pleasure in giving the claimant such compensation as she was entitled to, and which she would receive without any trouble if her land was on the other side of the ditch from that on which it is situated.

The following new evidence was given:—

Frederick Russell, examined by *Donnell*, said he was a mill-owner, and held land about two miles from Mrs. Johnston, under Lord Hill-Trevor. His land runs up about a mile and a-quarter from this holding. Witness held about eighty acres under Lord Edwin, and fifteen under Mr. Dunlop. He purchased the tenant-right of it all in different parcels. Part of it was held by lease and part by yearly tenancy. He gave as much for the one as the other. He was acquainted with the land all round for six or seven miles. The tenant-right exists on leased lands the same as the other. He knew no difference.

BARRY, J.—You knew of sales during the continuance of the lease, and purchasers continued on?

Witness—Yes; and Lord Hill-Trevor, for sixteen acres, gave £460, which I now hold from Lord Hill-Trevor himself, at the same rent, and an addition of 5 per cent. on the purchase money. I give £3 an acre rent. There is none of the rents beyond £2 an acre on Lord Hill-Trevor's, which is not too high.

Cross-examined by *May*, Q.C.—I have bought up land on the expiration of a lease about fourteen years ago. The ground had formerly been subject to 16s. of rent, and it has now been raised to £2. I paid £460 for the tenant-right of those 13 acres.

To BARRY, J.—As far as I have heard, the practice of selling at the expiration of a lease existed on Lord Donegall's estate in County Down, but I am not sure of that to my own knowledge.

Robert Carlisle, examined by *Andrews*, Q.C.—I am a farmer on Lord Downshire's estates, and hold about eighty-two statute acres. I have been there since 1817. Mrs. Johnston's farm comes within three fields of mine. When my father purchased, the land was under twenty-one years' lease; but, when I purchased, the lease had dropped. I bought from a man named Weir, who had purchased from one Montgomery, who had held under lease. The rent has been adjusted since I purchased the land. I have known of tenant-right sales taking place in the locality, quite beside where Mrs.



Johnston's farm is. From my experience of tenant-right sales I never knew any difference made on land held under a lease on Lord Downshire's estate. The tenant-right of the farm of Mrs. Johnston would be worth about £23 to £24 an acre.

James Kennedy, J.P., examined by *Donnell*—The tenant-right custom was invariable, whether a man held under a lease or from year to year. I never knew an exception. It is customary, at the dropping of the lease, to re-value the farm. I know that to be the custom on Lord Downshire's estate, and also on those of Mr. Batt, Lord Hill-Trevor, and Lord Londonderry, and, in fact, all over the country. I see Mrs. Johnston's farm every day, and I consider it vastly better than it was in her husband's time. I would say it is worth £2 an acre; and the tenant-right, if it was on Lord Downshire's estate, would be worth, at any rate, £20 an English acre.

Cross-examined by *May*, Q.C.—I have refreshed my memory since I was examined before the Chairman. I did not then recollect any cases of sales of tenant-right on the dropping of a lease.

William M'Keown, examined by *Andrews*, Q.C.—I had a piece of land under Lord Edwin Hill-Trevor, but I sold it about four months ago to Mr. Crawford. I got £150 for it. It contained about three acres Irish. There was a re-valuation of the ground when the lease dropped. Under the lease the rent was £3, and it has been raised to £8, and I continued to hold on as a tenant from year to year.

Thomas Gregg, examined by *Donnell*—I purchased the farms I hold from Lord Edwin Hill-Trevor and Mr. Batt. Some of them were under lease when I made the purchase. On the expiration of the lease of a portion of it the land was re-valued, and about 6s. 6d. taken off it, to reduce it to an equality with the surrounding yearly tenancies. At the end of a lease there is no difference as to tenant-right.

To BARRY, J.—I refer to Lord Downshire's and Lord Edwin Hill-Trevor's estates.

Cross-examined by *May*, Q.C.—The custom is that, on the expiration of a lease, there is a re-valuation, and they are allowed to remain the same as the other tenants.

Robert M'Cracken deposed to a similar custom on the neighbouring estate of Lord Ranfurley, of which Mr. M'Clure, M.P., was now proprietor.

*May*, Q.C., for respondent—Mr. Skeffington held under a lease from Lord Donegall for a long term of years, which would expire about 1875, and some time ago he sold his interest in the remainder of the lease to Mr. Torrens for the sum of £66. The claimant, Mrs. Johnston, held under a sub-lease from Mr. Skeffington, and on her lease expiring Mr. Torrens wished to resume possession of the farm, when she came forward with a claim for £400 against him as the value of her tenant-right. How Mr. Torrens was to get back that £400 from the head landlord did not appear. He thought the whole thing was a monstrous absurdity, because upon the estate of Lord Donegall no such thing as tenant-right had ever been heard of, nor had any witness ventured to say that he had ever heard of such a custom upon that estate. He submitted that, under the circumstances which would be proved, Mrs. Johnston was bound to give up the lands to Mr. Torrens, the purchaser, because there was no evidence to show that such a custom ever existed on the estate of the Marquis of Donegall, much less that, on the determining of a lease of this kind, it had ever yet been supposed that the lessee had a right to say to the reversioner—"You have a right to pay me tenant-right on my complying with the terms of the covenant." He considered it would be undisguised plunder to give the lady the sum she now asked for. The claim was as untenable a one as he ever heard put forward.

James Torrens, examined by *May*—Had been for some years agent on the Donegall estate. The estate is in five counties—Antrim has 70,000 acres in extent, Down 600 to 700 acres. There are 1,500 tenants on the estate. There are not more than a dozen tenants from year to year. There are a number of leases for life renewable for ever, and where there are not these leases they are for sixty-one years. A considerable portion of the Antrim estate leased at 5s. per acre, and would now value from £3 to £4. He never heard of tenant-right existing on this estate at the expiration of leases. A number of leases have terminated, but there was never any claim. Ballynaveigh was part of the Antrim estate. Mr. Biggar had a lease for sixty-one years. It expired about 1859 or 1860, and for some time he carried on from year to year. He made a sort of claim for tenant-right, but nothing was paid at the end of his lease. I know the case of Spitalpark, occupied by Mr. Alexander, at a low rent. At the expiry of the lease we took up

the land, and re-let it at four times the former rent, but no tenant-right was given. Reversionary leases were also concluded, but no compensation was given.

Cross-examined by *Andrews*—I never heard of the succeeding tenants giving any compensation to Mr. Alexander or Mr. Biggar. In none of these transactions was any recognition made of tenant-right. When the Marquis of Donegall lately sold the fee of part of the land leased to Mr. Skeffington, I made no claim on the purchaser, Mr. M'Causland, for my interest as the successor of Mr. Skeffington. Mr. M'Causland bought the sub-tenant's interest as well.

*Donnell*, for claimant.—If Mr. Torrens thinks it a hardship to pay Mrs. Johnston the value of her tenant-right, he can avoid it, by allowing her to continue in occupation at a fair rent, which she is willing to pay him—and it will be for Lord Donegall, the head landlord, to deal with her, when Mr. Torrens's interest expires. Tenant-right is proved not merely in the district—the existence of a lease making no difference—but on Mr. Skeffington's estate, of which this holding forms a part, in the sale to Sneyd of the tenant-right, and in the transaction which accompanied the grant of this very lease, when the arrears of rent and law costs were paid to the landlord, and an additional sum to outgoing tenant, as deposed to by him. That the Marquis of Donegall had denied tenant-right on his Antrim estate, which was separated from this by the town of Belfast, did not disprove the custom which obtained in the County Down district. The County Down tenants had no knowledge of a custom on far distant portions of that estate—the custom of which they knew, and as to which they must be supposed to have contracted, was that of their own district, including the Donegal estate therein.

His lordship reserved judgment.

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M'NOWN v. BEAUCLERC.      JOHNSTON v. TORRENS.  
WALLACE v. M'CLELLAND.

BARRY, J., on 14th December, 1872, 'gave judgment in these cases:—

The same question of law, and similar questions of fact, arose in all

three cases. Many of the witnesses and much of the evidence were common to two, if not all, of the cases ; and it was, in fact, arranged by consent that the voluminous evidence taken by me in the first case should be adopted from my notes in the second case. [His Lordship recapitulated the facts of the case in *M'Nown v. Beauclerc* (see *post*, p. 242), and proceeded.] It was not pretended that the claimant had proposed to continue as tenant at a readjusted rent, or that the landlord was willing that the claimant should so continue. The tenant insisted upon his absolute right to sell, or be paid the selling value, and the landlord insisted upon his right to resume possession without making such payment.

The other two cases of *Johnston v. Torrens* and *Wallace v. M'Clelland*, were also cases where tenants in the county of Down claimed a similar right to sell at the expiration of the lease.

The Chairman dismissed these claims ; a fact that *prima facie* suggests to us the conclusion that the usages throughout the county are not uniform. When the appeal in *M'Nown v. Beauclerc* came before me, the respondent went fully into the case in evidence. Both parties were represented by eminent counsel, and the case was contested on the law and facts with conspicuous zeal and talent. The propositions on both sides were stated without ambiguity, and discussed with ability, and I may observe that no argument was or could be used on the tenant's side which is not to be found in the able and thoughtful pamphlet on this question (of tenant-right on the expiration of a lease), recently published by my friend Mr. Donnell. As to the question of law being whether such a custom as is claimed here is a legal impossibility, I have listened with great attention to the forcible and learned arguments addressed to me by the counsel for the respondent, and I can fully appreciate how anomalous, in a strictly legal aspect, may be the alleged custom and its consequences, when judged by the criterion of the characteristics of a "custom" efficacious and binding at the common law. I do not intend on this occasion to discuss or pronounce any definite opinion on the point, but I confess that at present I am not convinced that the decision of Chief Justice Monahan, in *Austin v. Scott*, was erroneous. He has given his views upon the point in a few precise words, in his evidence before the Lords' Committee. His Lordship says :—"Then the question is whether there is any difference between that case (that is, a tenancy from year to year) and the case of a tenant who holds under a lease for years. I see none whatever, because in the abstract every tenant who takes premises from year to year enters into an expressed or implied agreement with his landlord to surrender the premises at the end of the term." If, therefore, it were

necessary for me to pronounce a decision upon the point, I should abide by that judgment of the Chief Justice of the Common Pleas, not merely as the decision (binding on me) of a judge of co-ordinate jurisdiction, nor in deference merely to my deep personal respect for his opinion upon such a point, but because (as I have said) I am not inclined to doubt the soundness of his conclusion ; but, at the same time, having regard to the doubts and views expressed by other eminent persons, and to a deliberate and fully considered judgment pronounced by the learned, able, and painstaking Chairman of Antrim, Mr. Otway, I should submit the point to the Final Court for Land Cases, reserving to myself (as I do now) full liberty to decide the question in the Appellate Court, according to such view as my reason, on fuller consideration than is now necessary, and the advantage of a conference with my brother judges, may be convinced to adopt. The next question, and it is a difficult one, is whether the alleged usage has been proved by the claimant as a matter of fact, to exist in respect of this holding. Now, on this point, a large amount of evidence was given on both sides. By the claimant, some witnesses were produced, who deposed, in general terms, that in the county, or in the parts of it known to them, and more or less extensive, and more or less near the estate of Mr. Beaucherc, the tenant-right attached as well on lands held under lease as under tenancy from year to year. These witnesses, however, admitted that they were unable to say that they had ever known an instance of the exercise of the right claimed at the expiration of a lease. The claimant further gave evidence to show that the practice was to continue the occupier holding under the lease, on its expiration, as tenant, if he paid an increased rent if demanded, and they proved instances of sums much larger than the value of the residue of the mere leasehold interest being towards the expiration of the lease, given, with the consent of the landlord, to the lessee for an assignment of his interest, and of the purchasers in such cases being continued on the expiration of the term as tenants from year to year, at an increased rent. It was argued that such practice therefore necessarily established—and these transactions could only be referred to—the existence of the alleged tenant-right ; but no evidence was given of an exercise at any time on the estate of such a right on the expiration of a lease, nor until the year 1871 of any assertion of the existence of such a right. Evidence was given of similar proceedings on other estates, and in one or (perhaps) two instances of what were stated to be “tenant-right” sales at the expiration of a lease, but the particular circumstances did not clearly appear. On the part of the respondent, it was contended that these transactions were not at all, or at least not necessarily, or even probably, referrible to such alleged custom ; that in

parts of the country where tenant-right is unknown, it is the practice at the expiration of the lease to continue the tenant in occupation, and large sums are given for the purchase of the leasehold interest towards its expiration, in order to secure that continuance ; that some of the sales proved were obviously not instances of any assertion or recognition of a right in the tenant to sell more than the mere leasehold, but were, in substance and fact, arrangements made by the landlord with some solvent man to purchase out a failing or unsatisfactory tenant, on the faith that the purchaser would be continued on the expiration of the lease as an ordinary tenant from year to year on the estate ; and they contended that such evidence in no way even tended to establish the right of the tenant to sell at the expiration of a long, and to the tenant highly profitable, lease, especially in a case where the landlord, as here, *bona fide* required the land for his own specific purposes, and not for the purpose of re-letting. The agent of the estate (Mr. Lyle) deposed to the fact that he had been agent to the estate of Mr. Beauclerc for about thirteen years ; that so far as he knew the practice on the estate no such usage as that claimed existed upon it ; that such usage did not exist upon other estates of which he was also agent ; and that, according to his experience and the information which reached him, it did not, in his opinion, at least generally, exist in the County of Down, and that he had never heard an assertion to the contrary until last year ; that since he became agent on this Beauclerc property, several old leases had fallen in ; that he had in every case re-let the lands upon special terms, excluding all tenant-right, as if he were dealing with a free possession of the landlord, and that in no case did any of the tenants under the leases object or claim any such tenant-right as is now set up by the claimant here. Evidence was given by Mr. Lyle and other witnesses of transactions on other tenant-right estates, showing no such usage to exist, and instances were proved of cases when, on the expiration of the lease, the lands were taken up by the landlord for his own purposes, without any such tenant-right being claimed or conceded ; and the counsel for the respondent relied (as they were certainly justified in doing) on the testimony of Mr. Filgate, the experienced agent of the largest proprietor in the county, Lord Downshire. Mr. Filgate was called as witness for the claimant, but although he to a certain extent supported the claimant's case by stating that an ordinary agricultural lease (say for 21 years), unattended with any special profit or advantage to the tenant, would not be regarded on the estate as necessarily ousting or excluding the ordinary tenant-right, yet he deposed that, under the circumstances of the case now before the Court, no such usage as that contended for by the tenant existed, and that the

landlord was, under such circumstances, entitled to resume possession as he required, without any such customary obligation to permit the tenant to sell or compensate him as specified in the notice; and Mr. Filgate gave instances of the falling-in of such leases on the Downshire estate, where no such tenant-right was ever demanded; and he mentioned one very remarkable case in which it was difficult, if not impossible to conceive that the tenant from whom the lands were taken at the expiration of his lease would not have claimed the benefit of the usage if he believed it to exist. Such is a brief summary of the voluminous evidence taken by me in this case. The whole of that evidence I have most carefully and anxiously considered and weighed, with a desire and intention, I need not say, to do justice between the parties, and to come to a determination upon the materials legitimately before me, and uninfluenced by any professions or preconceptions derived from other sources; and I have arrived at the conclusion that the claimant has failed to make out his case in evidence, and to establish to my satisfaction that the tenant-right custom, which he alleges existed in fact, as applicable to this holding at the expiration of this lease. I have mentioned certain points in the evidence, but I do not wish to be understood as basing my decision on any such point or points. I have stated that no instance was proved of the exercise on the estate of the right now claimed. But I do not mean that that fact is conclusive against the claimant. If it were clearly proved to my satisfaction that the alleged usage prevailed universally, or even generally, on the other tenant-right estates throughout the county of Down, or even in the district of which Mr. Beauchler's property forms part, I am not at all prepared to say that in such a case I would not refer some of the transactions proved to the existence on that estate of the alleged usage, and infer that existence from these dealings. Again, I allude to the evidence of Mr. Lyle as negating the existence in practice during the last thirteen years of the alleged usage. Now, I do not intend to convey that if it were proved to my satisfaction that the antecedent custom of the estate was that contended for by the claimant, I would consider that the tenant under this old lease could be ousted from the benefit of that custom by a new practice introduced at so late a period after the date of that lease. In fact, I do not intend, or profess to lay down—I have no power or opportunity to do so, nor does the case admit of my laying down—any general canon or rule of evidence, or theory or dogma for drawing inferences of fact which could bind or guide myself or any other person in any other case when the circumstances are dissimilar. I deal with the evidence as a whole. I give my opinion as the result of the impression produced on my mind by the evidence as a

whole, having regard (as I am bound to do) to the circumstances of this particular case. In thus coming to a conclusion different from that arrived at by the learned and experienced chairman, it is a great satisfaction to me that I have done so upon materials which were not at all before him. Were it otherwise, the knowledge that I was differing from him on this question of fact would largely increase the hesitation and difficulty I have experienced in dealing with the case. My decision, then, is that the claimant has not proved the holding to be subject to the usage stated in his notice. Those acting for the claimant have most prudently framed his notice in the alternative form, so that, if disappointed under the assertion of a tenant-right custom, he might fall back on the provisions of the statute giving him compensation for improvements. The case will, accordingly, be remitted by me to the chairman, with the necessary declarations and directions. Such being my decision on the second point of the respondent's contention, it becomes unnecessary for me to say anything on the third point—viz., whether the value of £1,400 put on the alleged tenant-right by the claimant's witnesses, and decreed for by the chairman, was excessive. I shall only observe that the supposed new rent upon which that valuation seems to have been based was very considerably below the rent put upon the holding by Messrs. Brassington & Gale, in their valuation of the estate in 1863 (since when the value of land in the district was stated in evidence to have increased), and was exclusive of a sum of £20 a year, which would be demanded from the tenant for county cess and rights on the seashore. In the case of *Wallace*, claimant, *M'Clelland*, respondent, the chairman, as I have already stated, dismissed the claim upon the ground that the usage was not proved. I affirm that decision, with costs of the hearing below, and of the appeal; but as there is in that case also a claim in the alternative for compensation for improvements, I should wish to put that claim, if it has foundation, in a train for being investigated and decided; and I shall hear any application which claimant's counsel may in that view deem it advisable to make to me. In the case of *Johnston*, claimant, *Torrens*, respondent, the chairman also dismissed the claim, upon the ground that the custom was not proved; and I affirm the appeal, with the costs of the court below, and of the appeal. In the case of *M'Nown v. Beauclerc*, I shall give the costs of the appeal to the respondent.



## DECISIONS OF CHAIRMEN.

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DORAN v. CUMMINS.\*

HANS H. HAMILTON, Q.C. :—

“A claimant under a dual claim must go upon one or other. Of course, if beaten upon one, it would still be open to him to go upon the other.”

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## THOMPSON v. TRUSTEES of the EARL of KILMOREY.†

*The tenant may serve a dual claim under the Ulster custom, and in the alternative under secs. 3 and 4 ; and he will not be called on to elect until the case is heard.*

R. JOHNSTON, Q.C., in giving judgment, said :—Keeping in view the intentions of the Legislature that the tenant should be legally entitled to whatever privilege he enjoyed under the usage in Ulster previous to the passing of the Act, I feel that if I put him to this election in the first instance I should virtually prohibit him in many instances from entering on proof of his claim under the custom at all, because there can be no doubt, and it is admitted by Mr. Murland in his argument, that many proprietors throughout the province of Ulster have from time to time so limited the amount of purchase, so encumbered it with restrictions, as to make the original tenant-right which existed on their estates of little or no value to the tenant. The tenant seldom knows when or how these changes have been made. He gets no information from his landlord's dispute of his claim, for it is merely a general denial of every thing the tenant claims. What I understand the tenant to say is this—“Let me hear proved what the rule of the estate is, and I shall

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\* Lurgan Land Sessions, 19th June, 1871 ; before Hans H. Hamilton, Q.C. ; 5 IR. L. T. REP., 145.

† Land Claim, Newry Sessions, 13th April, 1871 ; 5 IR. L. T. REP., p. 117.

then elect if I can avail myself of it, or whether I will abandon it and proceed for compensation under the 3rd section of the Act." I consider this a reasonable request, and that in granting it I prejudice no one, but afford an opportunity to both parties of finally settling the nature of the usage, if any, prevailing on the estate. The landlord cannot say that he is embarrassed by this mode of proceeding, because he has notice of both claims, and must be presumed to come prepared to meet both when he disputes them. In my opinion the intent of the Legislature was not only, as argued by Mr. Murland, to enable the Ulster tenant to avail himself of the 3rd section of the Act, where his tenant-right had been frittered away, but also to prevent him getting compensation under more than one or the other claim. If the tenant proves the right he claims under the Ulster tenant-right custom, I will hold him bound to adopt it, but if he fails I will not debar him from obtaining compensation, under the 3rd section of the Act, for disturbance. In doing this, I believe I am acting within the spirit, if not the letter, of this Act of Parliament, which being essentially a remedial one, comes within the rule laid down in *Dwarris on Statutes*, to which I referred yesterday, "that a remedial Act shall be so construed as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy."

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#### AUSTIN v. SCOTT.\*

*Evidence of the custom on the surrounding estates is presumptive evidence that it obtains on the lands in respect of which the claim is made. Where the estate usage has prevailed for a considerable length of time, and in a variety of transactions, this is the usage legalized by the Act.*

*The covenant in the lease is inconsistent with and excludes the custom.*

This was a claim under the custom, on the expiration in 1871 of an old lease dated 1st April, 1794. The other facts are set out in the Chairman's judgment:—

J. C. COFFEY, Q.C.—The claimant did not reside upon the farm, but lived in Enniskillen, though he farmed the land during his residence in that town. At the expiration of the lease Major Scott required possession of the farm, stating that he did not allow persons to hold land under

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\* Magherafelt Land Sessions, 27th June, 1871; before J. C. Coffey, Q.C.

him unless residing upon and cultivating it. Austin produced evidence to show that he could get a much larger sum than Major Scott was willing to give for the farm; and, also, that his father, on becoming possessor of it, gave £100. The question before me is whether this holding was subject to the tenant-right custom of Ulster; and I permitted evidence to be given of a custom on the surrounding estates and other portions of the district, from the prevalence on which I would have admitted its existence on Major Scott's estate; it being held under lease for such a considerable time, and no opportunity having arisen for the exercise of the custom, if it did exist. Being satisfied that the surrounding districts are subject to the Ulster custom, I must hold that this particular plot was liable to the custom of the adjoining district. Evidence had been given to satisfy me that the tenant-right custom for the unrestrained sale of the good-will of the occupying tenants existed in the surrounding districts and estates. As I said before, the question then would be—Was this estate liable to it? I said yes, unless evidence were forthcoming to show that a usage prevailed on this land different from that which existed on the surrounding estates. The evidence on that side was furnished principally by Major Scott's evidence, Mr. King's, and the bailiff's on the estate, coupled with the returns which have been given to me taken from the books of the estate. Taking the documentary evidence as it appeared from the year 1849 down to 1870, there were about twenty transactions of the sale of estates or transference of the land, and in all and each of these cases it did appear that the uniform rate of purchase as between the incoming and outgoing tenants was about five years' purchase, never exceeding it. In addition, I have the evidence of the bailiff, who stated that he knew this property for thirty years, and to his personal knowledge the sum invariably paid was at the rate of five years' purchase. Following the construction of this Act of Parliament, which I think is a safe one, and generally received by the profession—though there has not been any decision upon the point by the Court above—I am of opinion that the usages mentioned in the 1st section are usages varied in their form in every possible way that may prevail in the county over twenty or thirty different estates—that is, different estates may be ruled by different customs. Giving that construction to it, I have come to the conclusion that if I had before me evidence to satisfy my mind that a particular usage prevailed upon a particular estate, I am bound to give that practice all the force of law. In the present case I am satisfied that the particular rule existed of but allowing five years' rent. But a more serious question arose. There was a lease which contained a covenant that upon its expiration the lessee, and those coming after him, should be bound to deliver and yield

up in good and sufficient order all improvements made upon the farm at the expiration of the term. It was said—and there was much force in the argument—that notwithstanding the solemn covenant by the party that he should deliver up the premises at the end of the term, together with all improvements made upon them, that if the usage had prevailed—and although it was inconsistent with the covenant—still if it were shown to exist on any estate in Ulster, that the first section made that valid. I have not come to that conclusion; because, let the custom prevail or not, if it did exist at that period, there was the deed entered into between the parties with the knowledge that such a custom did exist, and they deliberately entered into this covenant. For that reason I am of opinion that in a case where the party has entered into a deed to surrender at the expiration of a term the improvements, that the custom or usage could not prevail against the deed, and that under these circumstances the claimant had no right to claim under the tenant-right custom of Ulster. But there was a concession here made by the respondent, who offered and was willing to give the sum of £55 in discharge of the claim, that sum being five years' rental of the farm. Of course I will give that £55, according to the statement of the respondent that he was willing to pay it. I therefore give a decree for that sum, dismissing the claim with costs.

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STEWART v. HART.\*

*The Ulster tenant-right includes payment for good-will and compensation for improvements, and exists in the case of leasehold interests. An agreement not to make improvements without the written consent of the landlord, or if so made, not to claim compensation therefor, is not inconsistent with, and is therefore subject to the Ulster tenant-right prevalent in the district. Value of tenant-right.*

In the course of the evidence a witness proved it to be the custom, even with leased land, to allow tenant-right.

R. Donnell—The question is, whether or not the following agreement debars the claimant from compensation under the Ulster tenant-right custom:—"Ringdufferin, 14th October, 1867. Gentlemen,—I request you will allow me to continue your tenant

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\* Newtownards Land Sessions, 18th April, 1871; before Robert Johnston, Q.C.

from year to year, from 1st November next, of the lands of Ballymacarron, containing fifteen acres or thereabouts, Cunningham measure, which are a portion of the lands adjoining your dwelling-house in Ballymacarron, which I have held under you for some time as tenant from year to year, and in respect of which I am under notice to quit on said 1st November next. And I propose that the yearly rent shall be the same as I have heretofore paid—viz., £25 18s. 3d.—and that I shall pay same at the same periods and in such manner—viz., by two equal payments—on every 1st May and 1st November—as formerly; and I shall cultivate said lands in a husband-like manner; and I shall give up quiet and peaceable possession of same on 1st day of November in any year, on getting six months' previous notice to do so; and that I shall not make any changes, alterations, or improvements on said lands without your consent in writing, and which consent shall not be construed to charge you with the expense of such changes, alterations, or improvements, or any part thereof, unless you shall by it undertake to pay for same, or any part thereof, and in such case you shall not be chargeable beyond the amount, if any, to be mentioned in such written consent.—Your obedient servant, David Stewart. Witness, James M'Crea. John and Henry Hart, Esqs., Ballymacarron." There was nothing in this contract inconsistent with the Ulster tenant-right custom. The Ulster custom consists of two elements into which it has been and might be analysed—payment for the value of improvements, and what might be called payment for the good-will. This contract is to exclude but a certain class of improvements, viz., improvements made after the term of letting. There is nothing in it which is repugnant to the Ulster tenant-right usage, which was a claim for compensation and improvements—(*Dale v. Humfrey*, 7 E. & B. 274; *Brown v. Byrne*, 3 E. & B. 715). There is nothing in it to show that the landlord proposed to resume the holding at that time, or any other time, without paying the tenant for the improvements made. His object was not to frustrate or nullify the Ulster tenant-right custom, but to guard himself against a claim which in equity would be unjust; because if he intended to resume possession of the holding for his own purpose, clearly it was fair, and just, and proper, that he should have regard to his future use of the land, and not be compelled to pay for future improvements not necessary to that

destination of the land. What has been done in this case is altogether in the spirit of the Ulster tenant-right custom when the tenant was under notice to quit.

*Gardner*, for the respondents. A very material element in the Ulster custom was the payment for improvements. This agreement expressly excludes the making of improvements; and in the face of it no tenant would purchase these lands from Stewart. When Stewart made this agreement with his landlord he relinquished any tenant-right which may have existed for the privilege of being continued in occupation. The agreement debars the claimant from compensation under the 1st section of the Act, as it is virtually a purchase or acquisition of the tenant-right.

The CHAIRMAN—I have always understood that at the determination of a lease a tenant under the tenant-right custom had an interest. The rent might be raised, but not so as to confiscate that interest.

The CHAIRMAN, in giving judgment, said he had given this document the best consideration he could. Some people said they did not understand and could not define what the Ulster custom was. He confessed he never had any difficulty in understanding it. He might not be able to define what it was in this part of Ulster. There were other parts of Ulster with which he was more familiar. The amount of improvements was no doubt an element in the Ulster tenant-right custom, but was not the only ground on which the tenant was allowed to sell his farm. In the parts of Ulster with which he was familiar, the tenant had the right to sell independent of improvements. He had known farms bought and sold on which one penny had not been expended for years. The amount of the purchase no doubt depended on the improved state of the farm. Regarding this agreement, he did not consider it debarred the tenant from claiming, under the Ulster custom, for the improvements effected prior to its date. At the time this document was served the tenant was bound to make no further improvements, or to do anything that would add to the value of the farm, or, if he did, he could not claim compensation for it, but the agreement had no reference to the improvements prior to its existence. The only question was, did the tenant-right custom exist on this farm at the time the notice to quit was served, and what was the rate of purchase? There was some difficulty in finding out what the exact value of the tenant-right was in this case. The evidence varied in this respect. He found £20 an acre given in this neighbourhood. He also found £13 an acre given. The only question

he had to consider was, what he considered a tenant would *bona fide* give for this man's interest in these  $14\frac{1}{2}$  acres? He must bear in mind, in forming that value, that this farm required a house. A tenant requiring the farm would also require a house. It would take something to build a house. Judging of the evidence given before him, he had no right to say he disbelieved any of it, but he was to say what he believed the fair value to be. He had calculated it at fourteen years' purchase, which, for  $14\frac{1}{2}$  acres, would amount to £203.

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WRIGHT v. PARKER.\*

*The Land Act should be construed as a remedial Act, so as most effectually to meet the beneficial ends in view and prevent the failure of the remedy. A restriction on the estate to so much per acre will not regulate the value of the tenant-right in a particular holding, it not being proved as a prevalent custom, and the custom of the district being unrestricted. Value of the tenant-right in the barony of Newry.*

The claim was as follows:—

The said James Wright claims the following sums, due to him by way of compensation, under a tenant-right custom recognized by the landlord, under whom, and with whose sanction, claimant purchased the said land—namely, the custom which gives permission to a tenant to make sale of the interest or tenant-right at any time he may think fit, on providing a man of good character and solvent circumstances to succeed him. Said claimant therefore claims the sum of £475 15s. 8d., which is the amount that a man of good character and solvent circumstances would give at present for said holding.

In 1848 the claimant's father purchased the farm, which consisted of 13a. 2r. 15p., from a tenant named David Lyster. The sale was made in the presence of Mr. M'Neilly, agent to Miss Waddell, who was then the proprietress. Mr. M'Neilly gave Wright the following document at the time in order to protect him in any contingency:—"Wm. Wright purchased the farm from

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\* Newry Land Sessions, 14th April, 1871; before Robert Johnston, Q.C., 5 IR. L. T. REP., 87.

David Lyster, in Curley, with the full and free permission of Miss Waddell. He has this day paid rent up to the 1st November last, and obtained permission to make sale of his interest or tenant-right at any time he may think fit, on providing a man of good character and solvent circumstances to succeed him.—D. W. M'Neilly." Miss Waddell was succeeded in the ownership of the land by Mr. Parker, the present respondent. The rent was 38s. per acre. The tenant had afterwards improved the holding. Several witnesses put the value of the tenant-right of Wright's farm at £35 per acre. The claimant offered, if this sum was allowed, to give the landlord £90 per acre for the fee. This offer was refused. The evidence of Hugh M'Conville, one of claimant's witnesses, as to the value of the tenant-right in the barony of Newry was as follows:—I believe Wright's farm worth £33 10s. per acre. I have been at sales on my own estate—the Marquis of Downshire's. The custom is to give the preference to a neighbour, and the money is referred to arbitration. The arbitrators give sometimes £40 and £50 per acre. On General Meade's estate I know of cases in which land sold at from £50 to £80 per acre, without leases. On Lord Annesley's property the tenant-right is equally high.

The custom on respondent's estate was to allow £11 per acre. In this case he was willing to allow an additional sum for improvements.

*W. Kaye, LL.D.*, for respondent, submitted that the Chairman could not give more than £11 per acre, but, of course, as his client had offered £5 per acre for improvements, he would consent to it. If on a particular estate a particular custom is proved, it would be strong evidence for the Court to go by, even although the custom of the particular holding was different. But no evidence had been given on the part of the claimant as to what the custom of the holding was, and any evidence given in support of the claim had been met by Mr. Parker and Mr. Lyster. An individual holding should be proved to be subject to a certain custom. The proper amount of the tenant-right was the amount the tenant himself paid for input. The Act should be construed strictly and grammatically.

*R. Donnell*, for the claimant. The Act should not be construed strictly. The intention of the Act was remedial, and it should be construed so as best to carry out the intention of the Legislature,



according to the rational construction of its language. This was the principle adopted by Judge Fitzgerald in *Hill v. Lord Antrim*. On the evidence of Mr. Parker himself, no particular usage has been established on which the Court could act, and therefore the only usage that should be taken into consideration was the general usage of the neighbourhood, as stated in the evidence of the witness. The idea of an usage for an estate of 100 acres is absurd. Suppose a family had come into occupation of a certain holding generations ago, where they had built a house, made—in fact, created—the land, could it, because there was no tenant-right in the holding, and no proof adduced of any such transactions, be said that there was really no tenant-right there? The Legislature intended to give the tenant-farmers “what was known as the tenant-right of Ulster.” The usage of Mr. Parker’s estate was not known as the tenant-right of Ulster. The rent of this farm was 38s. per acre, which showed that the high tenant-right had not encroached on the value of the landlord’s estate. If the tenant claimed £35 an acre for his tenant-right, he was willing to give the landlord £55 an acre for the fee-simple.

The CHAIRMAN, in delivering judgment, said he confessed the question he had to consider was not free from difficulty; and it was whether there was anything on this particular estate to take it out of the general rule, which he was satisfied prevailed in this district—commonly called the Ulster tenant-right custom. He was aware that the value of tenant-right on estates depended much on who the proprietor was, and the rate at which the land was let. There did not appear to have been any direct proof given here to show him the rate at which the tenant-right was purchased on this particular estate. But evidence had been given of the sales of farms on some adjoining estates, some of them being particularly favoured estates—one of them being the Marquis of Downshire’s—where almost fabulous prices were given for farms—he, presumed, much from the fact of the land being let at a moderate rate, and there being no interference with the right of sale. On other estates large prices seemed to have been given. He had evidence of the case of a sale on the estate of the Earl of Kilmorey, where restriction appeared to have been exercised, and a sum of £15 per acre taken. He should differ from the view laid down by Dr. Kaye for the construction of this Act of Parliament. They should all bear in mind that this Act was passed by the Legislature—whether rightly or wrongly, it was not for them to say—to remedy a defect in the common law. The object of

it was to prevent proprietors from depriving tenants of their means of livelihood without paying them for their good-will of the land, or giving them compensation, and such an Act of Parliament, being essentially a remedial Act, should be construed so as most effectually to meet the beneficial ends in view, and prevent the failure of the remedy. He did not mean that this should be done by any straining of the Act of Parliament, but it should be carried out as far as the fair grammatical construction of the Act of Parliament would admit, and it was in this way that he intended to construe it. He did not think he was driven to what was called a liberal construction of the Act, in order to arrive at a conclusion in this case. He did not think there had been sufficient evidence of the custom on the estate to confine the tenant to the price paid originally for the land. Taking all the circumstances into consideration, he thought Mr. Parker had not dealt unfairly with the tenant; because, in addition to the £11 per acre—very likely all he considered he had a right to give—he proposed to add £5 per acre for improvement. The tenant thought proper to refuse this offer, and he (the Chairman) was now asked to measure the amount of compensation he would allow this tenant, according to the sums paid on such estates as the Marquis of Downshire's. Now, as he had said before, and as everyone knew, the rate of purchase differed on every estate according to the proprietor. He knew estates adjoining each other, and while on one £40 per acre was paid for tenant-right, on the other it might not exceed £10, and if he held that the tenant-right on both the estates should be the larger sum, he would be acting very unfairly. Taking into consideration the rate at which the land was let—38s. per acre—he had no distinct evidence as to the quality of the land, but he presumed it was very good land—he thought the rent rather more than what was paid on Lord Downshire's estate. He thought he would be acting as fairly as possible to both sides if he allowed the tenant £20 per acre, which he thought would amount to £270.

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M'NOWN v. BEAUCLERK.\*

*A lease is not inconsistent with the tenant-right custom; and at its termination, the tenant who is being evicted, is entitled to the value of the tenant-right.*

Andrews, barrister, stated the case:—The farm in question was let in the year 1798, on a lease dated 20th December, by Lord

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\* Newtownards Land Sessions, 5th April, 1872; before Robert Johnston, Q.C.

Charles Fitzgerald to James M'Nown, the grandfather of the claimant, to whom it came down through the family. The claimant had been the owner of it for a considerable number of years. The farm comprised 70 acres and 3 roods (Irish), and the yearly rent was £58. The lease made for three lives, the last being that of William M'Nown, who died on the 29th of December, 1871. Proceedings were then taken, and an ejectment decree obtained, and thus the present land claim came to be served. It might be urged for the respondents—indeed, if they were not going to urge it, he did not know what they were going to urge—that by the reason of the existence of this lease that was not a case to which the Ulster tenant-right custom applied. But in a district where the Ulster tenant-right custom existed, the effect of a lease or covenant to give up possession at the end of the term did not preclude the tenant from receiving whatever was a fair amount of tenant-right compensation at the end of the tenancy. There was no better cultivated farm than this in the north of Ireland, nor one in which the tenant had, from time to time, overcome greater obstacles in bringing it up to its present state of cultivation. When the farm was let by Lord Charles Fitzgerald—whose interest had become transferred to Mr. Beauclerk—to James M'Nown, in 1798, it was of the most inferior description, but through the indefatigable exertions of the claimant it had been brought up to a very high state of cultivation. He drained it and reclaimed it, blasted rocks, erected buildings, put up gate pillars, removed old ditches, enlarged the houses for feeding cattle, &c., and had made it one of the model farms of the county. The lease having expired in September, 1871, a brother-in-law of M'Nown, named Currie, communicated to Mr. Lyle the news of the death of the surviving life. He also had an interview with him in the following month, and the result was that Mr. Lyle expressed the wish that Mr. Currie should put on paper something like what he wanted, in order that he might consider it. Mr. Currie accordingly wrote to Mr. Lyle, and requested him in the letter to state what rent he, as agent for Mr. Beauclerk, would charge for the farm, and allow him to dispose of it to a solvent tenant. That was written on the 15th of December, and Mr. Lyle, having had an opportunity to consider it, wrote on the 20th of December, stating that Mr. Beauclerk did not intend to let the farm, and that he did not consider tenant-right existed in

reference to it. Matters being now at a tolerably distinct issue, and a notice of ejectment process having been served, an ejectment decree was obtained at Downpatrick before his Worship, and a memorandum was drawn, by which the claimant was to have possession of the house and buildings until the claim should be heard at the Land Sessions, and in order that he might dispose of the crop, materials, &c. Mr. Lyle distinctly denies the existence of tenant-right on this farm. This was one of those cases which manifested, in a very remarkable manner, the great value of the Land Act. Had this last life of the lease expired three or four years ago, this tenant, who had done so much to improve his farm, would have been obliged, when his health was failing him and his faculties giving way, to leave his holding, which, with all its improvements, would have gone over to the landlord. Fortunately, the Land Act intervened, and he now came before that Court to seek fair and just compensation.

Joseph Munce deposed to *Andrews* that he lived in the neighbourhood of M'Nown's residence. He had a farm under Mr. Beauclerk, and his memory extended back to 1798. Tenant-right was recognized on that estate. His father had purchased under that custom; he had done so himself, and he had known instances of others doing so. Tenant-right had existed on that property so long as he could remember. He recollected Mr. M'Nown's farm fifty years ago. On passing over it he found it in a very backward state, being covered with briars, whins, brackens, and rocks. That same land was now in a first-rate arable condition. It was what he considered a model farm. At a moderate and fair rent—say 30s. the Irish acre—it would sell for £1,500 or £2,000.

Cross-examined by *Murland*—To the best of his recollection, there were five or six acres of the land in the condition he described. About nine years ago, on revisiting the same place, he found the briars, &c., were removed. On that estate 30s. an acre is now considered a moderate rent.

Charles Johnston, bailiff, had known cases of sales under the tenant-right having taken place. Mr. M'Nown's farm was the best he knew of on the estate, and he never visited it but Mr. M'Nown was improving it in some way.

James Gilchrist, farmer, near Ardglass, also proved the existence of the custom. In his early days about two-thirds of the farm of

M'Nown was in a barren state, and now it was what he would call a model farm. At £2 an acre he thought it would bring easily £1,400 or £1,500.

Mr. Stockdale, builder, said he had inspected the buildings on the farm. They were all in good order; and he was of opinion that none of them were superfluous. The fences on the farm were very superior. He valued them at £202. The value of the whole of the things on the farm, including roads, fences, buildings, plantation, &c., he considered to be £910 8s. 6d.

Some other witnesses were examined for the claimant.

*Murland*, for the respondent, went into a statement contradictory of the facts that the farm was in a bad condition when the lease was entered upon by Mr. M'Nown; and maintained that it was most improvable land. If the landlord contemplated taking the farm into his own possession, he never thought of doing so without reasonably compensating the tenant; and it ought to be borne in mind that Mr. M'Nown had been to a great extent remunerated by having had undisturbed possession for so lengthened a period, thereby enabling him to reap the benefit of his improvements. Mr. Murland also pointed out an offer his client made to Mr. M'Nown, to give him a free house, and probably an annuity of £30 a year. He condemned the letter which had been written on behalf of the claimant, and contended that there was no tenant-right existing on a farm at the expiry of a lease. He understood that tenant-right existed simply in the case of a tenancy from year to year.

The CHAIRMAN, after commenting on the credible nature of the evidence that had been adduced in support of the claimant's case, said he was inclined to believe that the farm was in reality what it was described to be—a model farm. With regard to the letter which had been addressed to the respondent, he took a different view from Mr. Murland. He thought it was a straightforward proceeding on the part of the claimant to go to the landlord and ask him to fix the rent, at the same time intimating that it was his intention to sell; and it was certainly much more creditable than the course which was sometimes adopted, of selling the tenant-right and then getting the landlord to fix the rent, as if they were intending to remain, keeping him, in the meantime, in ignorance of the fact that any transaction had been entered into. He had never heard that a tenant had a tenant-right if he remained in occupation, and that if he wished to sell that he had no tenant-right; he

thought that if there was any tenant-right at all the tenant was as much entitled to sell it as to remain in possession. As regards the contention of Mr. Murland, that there was no tenant-right custom at the expiration of a lease, he could not agree with that statement. It, therefore, only remained for him to say what sum he considered the claimant was entitled to ; and, on consideration of the evidence of the witnesses who had been produced, and who stated that they themselves would be prepared to give the sum at which they valued the farm, he did not think they had gone beyond the value in estimating it at £1,400, and he did not think that he would be justified in giving a farthing less than that sum.

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ALLISON v. MANSFIELD.\*

*Evidence of the custom of adjoining estates is presumptive evidence of the existence of the custom on the respondent's estate. The fact of the leasehold tenant-right not being satisfactorily proved, claim dismissed, but leave given to file another claim under the general provisions of the Act.*

This claim was under sec. 1, and was for £400, the value of the tenant-right of the claimant's farm, from which he was being ejected on the determination of his lease.

The farm, which contained 22 acres, Irish plantation measure, was held by lease bearing date the 17th of July, 1808, for three lives, with a concurrent term of 31 years, on a small property which was then owned by a family of the name of Armstrong. The interest of the Armstrongs was sold in the Landed Estates' Court in 1866 to the respondent. The conveyance to him was of the fee, subject to the then existing tenancies, among the rest that of the claimant, which was therein described as a freehold lease for two lives then surviving.

The claimant was examined, but failed to prove any sales of tenants' interests under the custom on the Armstrong property. He stated that he had heard that his grandfather, the lessee of 1808, had paid a sum of money on getting his lease ; but on cross-

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\* Land Claim, Lifford Sessions, 12th Jan. 1872 ; 6 IR. L. T. REP., p. 37.

examination he admitted that he had heard that this money had been paid to Armstrong, the then landlord. A number of witnesses were examined from adjoining estates—all of much greater extent than the respondent's, which only contained four other farms—who proved frequent sales of yearly tenancies, with the landlord's consent, on those estates; but no evidence was given of any instance of the tenant being allowed to sell, or having compensation granted to him, when evicted at the expiration of a lease. It was stated that some tenants on these estates whose leases expired had been allowed to continue on as yearly tenants, in some instances at a raised rent. Evidence was also given of the value of the tenant-right. No evidence was gone into by the respondent.

*R. Donnell*, barrister, for the claimant. The clause of surrender is no bar to this claim (*Austin v. Scott*, 5 I. L. T. R. 173). The mere fact that no sales under the custom have been proved does not show that the custom does not exist. The law knows no such division as an estate (*Wormesley v. Dalby*, 26 L. J. Ex. 219). Besides the respondent's estate is too small to have a custom of its own. The custom has been proved to exist in all the surrounding district, and the presumption is that the general local system applied to this property also. It is for the respondent to rebut this presumption, and he has not done so. With regard to the adjoining estates, the fact that no sales were proved to have taken place, or no compensation to have been paid by the landlord on the expiration of a lease, does not show that the custom does not attach in such a case. It merely shows that the necessity for such a proceeding did not arise. It is proved that tenants were allowed to continue on in their holdings. Selling is not the tenant-right: it is the usual, but not the only mode of realizing its value, and if the lessee is permitted to continue on after the expiration of the lease, on the same terms as the yearly tenant, he has the same tenant-right, whether he realizes its value by sale, or continues in occupation.

*A. M'Conchy*, barrister, for the respondent. *Austin v. Scott* does not apply. The farm in that case was admitted to be subject to the custom, and the question was, what was the custom? We deny the custom altogether in the present case. The Court must see whether this estate is subject to the custom at all. An estate may be subject to a usage or exempt from it. In

the present case there is not a shadow of proof that the usage ever existed on this estate. Secondly, the custom proved on the surrounding estates is not that contended for here. The only custom proved was with regard to tenancies from year to year. They do not apply to this case. Thirdly, even if such a usage as is here contended for had been proved to be general in the district it would not affect the respondent's estate. It has been from time immemorial held in fee-simple, independent of the surrounding estates, and never formed a portion of any of them. The principle acted on in *Patton v. Johnston* (5 I. L. T. R., pp. 101 and 159), does not, therefore, apply. The Court is not to presume the existence of the Ulster tenant-right unless it is proved to apply to the holding in question. The third and other sections of the Act were framed for the purpose of meeting such a case as the present. The tenant has chosen to decline that privilege, and must abide the consequences.

J. GIBSON, Q.C.—The present case is the first that has come before the Land Court of the County of Donegal, in which a claim is made, under the first section of the Act, claiming the benefit of the Ulster custom on the expiration of a lease of the long term of three lives, or thirty-one years. Only one tenant on the property, purchased by the respondent in the Landed Estates' Court in 1868, was examined, and that was the claimant himself, and he has failed to prove the existence of any tenant-right custom whatever on that particular estate. I must assume from the evidence that for more than sixty years, from 1808 to the present time, no such custom has in fact existed on it, and at that time, it would appear, to use the expressive words of one of the witnesses, that "there was little talk about tenant-right then." Under these circumstances I am asked by the claimant's counsel to infer its existence on this estate at that remote period, from the fact of its existence on the surrounding estates. Now with regard to this part of the case, I think that considerable weight is to be attached to the argument of counsel for the respondent, that his property appears from the Landed Estates' Court conveyance to be an independent fee-simple estate, and is not shown ever to have formed part of any of those surrounding it, and if a conjecture is to be formed from the circumstance that all the other leases mentioned in the schedule to the conveyance are, in fact, subsequent in date to that under which the claimant held, and that no head rent ever appears to have been payable by the Armstrongs, as none is reserved in the Landed Estates' Court conveyance, it would appear



probable that that family had themselves been in exclusive possession of the whole, and that perhaps from a very early date. But the circumstance that no such custom as is here contended for has been proved to exist, as required under the 1st sec. of the Act, is, in my opinion, conclusive against the claimant. The custom here contended for is a right to sell, or receive a sum equivalent to the selling value, when turned out on the expiration of a lease for the long term of three lives, or thirty-one years, and the evidence given of the custom in the surrounding district in no instance extends to such a case. I must, therefore, dismiss the present claim, but give leave to the claimant within seven days to file such other claim under the other sections of the Act as he may be advised.

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WEIR v. KNOX.\*

*The Ulster tenant-right extends to leased lands, and applies to town-parks equally with other holdings. The Chairman may reduce the amount he would otherwise have awarded as the value of the tenant-right for improper conduct of the tenant.*

This was a claim, under the Ulster custom, for £200, the value of the tenant-right of five acres and a rood of land, part of Lifford Commons, adjoining the town of Lifford, which the claimant held under lease, at the yearly rent of £13 14s. 6d. The lease determined last year, and thereupon a Civil Bill ejectment for overholding was brought; and as the respondent desired to resume the holding, the claimant claimed compensation therefor.

The notice of dispute disputed the whole claim, and alleged that the said lands were known as town-parks, which bear an increased value as accommodation land, and therefore no compensation was payable therefor; and claimed a set-off of £50 for dilapidation and injury to gates and fences, and of £150 for exhaustion of land.

Donnell, barrister, for claimant, said that the lands were not within the exception of town-parks in sec. 15, as the claimant did not reside in the city or town, but lived in the country. The set-off for dilapidation and deterioration was not applicable to a claim

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\* Lifford Land Sessions, 12th Jan., 1872; 6 IR. L. T. REP., p. 38.

under the Ulster custom (*Johnson v. Patton*, 5 I. L. T. Rep., 151).

*M<sup>c</sup>Conchy*, barrister, for respondent, said as the claim was a dual one, these items of set-off were properly introduced to meet a claim under sec. 4. They disputed the existence of the custom on the respondent's estate, and denied that it applied to town-parks or tenants at the end of a lease.

Several witnesses proved the existence of the tenant-right custom in the case of yearly tenancies of houses in Lifford, and the town-parks and fields adjoining the town. A witness deposed that he had offered and was still willing to give £140 for the claimant's farm.

John Cochrane, Esq., J.P., agent of the Earl of Erne, deposed that Lord Erne was the landlord of most of the houses in Lifford, and the lands adjoining, and that on the Erne estate he had not known instances of the custom at the determination of a lease, as the leases on that estate were of recent date, and none had yet dropped; but speaking of the custom generally, at the end of a lease it would be a violation of the custom to eject a tenant without compensation. The custom is to raise the rent to the ordinary valuation on the estate, and the tenant continues to occupy at that rent, when he may sell his interest to a solvent and unexceptionable tenant. On the Earl of Erne's estate the rule is five years' rent, but that limit is often permitted to be over-stepped, when the tenant has made considerable improvements. The cases where the limit was exceeded were, he thought, more numerous than those where it was enforced. He believed that the present holding formed a portion of 45 acres, which had been given by a former Earl of Erne, about a century ago, to fifteen of the old inhabitants of Lifford, when the commons were enclosed. He thought there was no tenant-right in these town-parks. It would be impossible to tell the limits of this portion so reserved.

The respondent was examined to disprove the custom, but on cross-examination admitted that he had given £50 for the interest in a lease, which had only four or five years to run, at a high rent; and if he had expected to be turned out at the end of it, he would not have given so much. He had, however, purchased the fee of it before the lease determined.

J. GIBSON, Q.C.—The evidence in this case establishes the fact that

the tenant-right custom prevails on the estate of the Earl of Erne, but only to the extent of the tenant being allowed five years' rent, as the value of the tenant-right of his holding. Mr. Weir, the agriculturist on Lord Erne's estate, has stated in his evidence that there is no difference made as to the allowance of tenant-right between town-parks or other holdings under his Lordship. I must therefore declare that in this case the claimant is entitled to the value of the tenant-right of the fields in question. But it has been proved that the lands are in a very impoverished state, and that the claimant has, with intent to injure the landlord, exhausted the lands, so that a considerable expenditure in manuring would be required to bring them into good condition. I feel, therefore, called on to exercise the discretionary power given by the 18th section of the Act, and on account of such improper conduct on the part of the claimant to reduce the value of the tenant right to four years' rent, the amount of one year's rent being in my opinion not more than sufficient to restore the lands to such good condition as a course of good husbandry reasonably requires. From the amount of these four years' rent the arrears of rent, now admitted to be due, must be deducted, and the claim be allowed for the amount of the residue so ascertained.

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SAMUEL BURNS v. EARL OF RANFURLY.

*A leaseholder, on the expiration of his lease, is entitled to a re-valuation at a fair rent, and to sell subject to such rent—where such is the tenant-right custom of the district.*

R. Donnell, for claimant, stated the case:—This was a claim for £700, the value of the tenant-right of 34 acres of land on the determination of a lease. A notice accompanied the claim, quite in the spirit of the custom which was claimed, offering to take the land as tenant from year to year and pay a reasonable and proper increase, which was stated to be £32 per annum, having regard to the tenants' improvements. The previous rent was £20. The present respondent became purchaser in the Landed Estates' Court in 1863 of the estate of Mr. Cuppage, of which this holding formed a part. The lease was dated 5th November, 1851, and was made by John Cuppage to Samuel Fox and a man named King, from whom the present claimant's father had purchased the tenant-right for £240.

The claimant was prepared to prove that as a matter of fact on the Ranfurly and adjoining estates the tenant-right custom at the end of a lease was not that the lease extinguished the tenant-right, not that the landlord had a right at the determining of the lease to take back the land and turn the tenant bare upon the world, but that the custom was at the expiration of the lease, that the land should be fairly valued, and that the tenant was entitled, as a matter of custom, to continue on at that fairly valued rent; or if the landlord then desired to resume possession, or disturbed the tenant in any way, that he was entitled to tenant-right compensation at that fairly valued rent, just as if he had been a yearly tenant. Now, it was a matter of decision in the Land Courts that the first section was the only indication that they had in the Act of what the tenant-right custom was, and it was the duty of the Court simply to inquire on the sworn evidence before it what was the tenant-right custom. Having found out what that was, as the Act did not define tenant-right, or did not describe it, but left it to the Court to inquire into, it was its duty to enforce it, and the powers of the Court were very large in that matter. They could enforce the right specifically by attachment, or grant a decree for compensation. So anxious was the Legislature that in no way should the Ulster custom be defined, that not even would they say that the custom was one of compensation; and it was a matter of history in the Bill, that the 16th section of the Act, on which the whole jurisdiction was founded, had been amended so as to include "claim in respect of a right," as well as a claim "for payment of any sums due by way of compensation." The Act clearly distinguished between claim by way of right and claim by way of compensation. Under the third paragraph of the 23rd section, all the powers of enforcing the order of the Court which existed in the superior Courts of law were given to the Chairman. There might be a lease which excluded in express terms the custom; but in the case of the ordinary lease what was known to the farmers of Ulster as the custom was to continue in occupation, at its expiry, at a fairly-valued rent, or if evicted, or desiring voluntarily to quit, to get the fair value of the ordinary tenant-right. The fair valuation was the first step, an essential part of the custom, and the landlord by refusing to take that first step, violated the custom as much as if he refused the second part, the right of sale.

Numerous witnesses on the Ranfurly and other contiguous estates deposed to the usage stated by counsel, and which was one of the usages known as the Ulster tenant-right custom. Several of them proved that £32 would be a rent rather beyond what was warranted by the custom. None of them had known or heard of an instance in which a tenant at the end of a lease had been turned out without tenant-right compensation.

Robert Thompson deposed that he came into possession of his farm in '48 with consent of the landlord. The previous tenant was ejected. He came into possession on the agreement that he should be a tenant from year to year. He paid about £6 per acre on coming into possession, and got, he thought, about £15 an acre on selling. The farm contained about nineteen acres.

Mr. Buchanan, agent for Lord Charlemont, proved that the uniform practice on Lord Charlemont's estate on the expiration of a lease was to re-value the land at the same valuation as the yearly tenants, and allow them to continue in occupation. Could not say with regard to the permission to sell the interest if the law recognized an interest.

John Kinlay Toner said he was an extensive land agent. Was agent for estates adjoining Lord Ranfurly's. Tenant-right existed on those estates, and on the dropping of the leases the tenants continued in possession. Was not aware that such tenants were debarred from the right of selling their interest. Would, in fact, think it a violation of the custom.

Mr. Diver, land agent, gave similar evidence. The custom of valuation on the estates with which he was connected was to value the leased lands along with the lands held by yearly tenants; and on the dropping of the lease the tenant was taken on at that valuation.

William J. Robinson, surveyor, deposed that he had examined the claimant's farm, and he would say that £32 was a fair rent according to the custom, and at that rent it would sell for £400.

This closed the plaintiff's case.

*Hugh Holmes*, for respondent, argued that the grant of a lease put an end to the custom, and the custom could not be revived, except by the creation of a new tenancy from year to year. The custom of continuing in occupation at a fair rent which had been deposed to by so many witnesses was only what was usual in all

town-lettings. This was not the Ulster custom, which applied only to yearly tenancies. The covenant in the lease to deliver up the premises at the end of the term was inconsistent with such a custom. It was laid down in *Hutton v. Warren*, and other cases on agricultural customs in England, that no custom inconsistent with the terms of the written instrument under which the tenant held could be regarded as a portion of his agreement. Counsel also relied on the fact that this particular holding had been held for a hundred years under a *toties quoties* lease, which had been evicted for non-payment of rent in the year 1850, and the lease then given was given in discharge of all claims which the evicted tenant might have had on the land.

Courtenay Newton, J.P., examined by *Holmes*—I am the agent for the Earl of Ranfurly. The lands on which this farm forms part are Church lands. The farm was held formerly under a *toties quoties* lease. In the year 1847 there was a year and a half's rent due under that lease. The then landlord ejected for non-payment of rent; the *habere* was executed, and the farm remained vacant for a considerable time. Claims were, however, made on the landlord by the ejected tenant and his creditors; and in order to meet fairly these claims, Mr. Cuppage granted the lease of these lands to two persons, Samuel Fox and a Mr. King. One of these represented the dispossessed tenant, and the other, the creditors. That lease was granted at a low rent, in consideration of the claim for improvements which the dispossessed tenant under the *toties quoties* lease had made.

To *Mr. Donnell*—I am fighting out this case on behalf of the landlords of Ireland. It was not a custom, but a privilege or practice on the estate, to continue the leaseholder at a fair rent at the end of his lease. I would call it an indulgence.

Was not the yearly tenant's right equally a privilege, practice, or indulgence?—I cannot say; but I think it was right of the legislature to make it the law of the land. The custom should have been defined, however.

Leaving out the leaseholders?—I never thought of the leaseholders.

Did you ever know a leaseholder on the Ranfurly estate dealt with as this tenant has been?—No; I never knew a case of the sort, except one.

What case was that?—Nancy Murphy's. That was after the Land Act.

Then the custom of the estate has been changed since the Land Act. Do you believe that is what the Act designed when it legalized the custom then existing?—The custom is changed, and badly, too.

What was the practice on the estate when the lease dropped?—The practice was to employ a valuator.

Did you employ a valuator in this case?—No.

Then you departed from the custom?—It was no custom at all.

Practice, then?—I objected to his non-residence on the farm before the Bill was passed.

Was this farm held on the same principle as the other farms on the estate?—Yes.

And did you allow the others a saleable tenant-right interest?—Yes.

*Donnell*, for claimant, argued that to eject this tenant would be contrary to the custom of the estate. The distinction made between practice or indulgence and custom was imaginary. What was indulgence before the Act was now legal right. To eject this tenant without a penny, as the other side contended, was not to legalize, but overturn, the custom. The case of tenants in towns was very different. They held by competitive rents; and when the rent was fixed, they were not left a tenant-right interest of ten or fifteen years' purchase. If they were, that was a tenant-right in the true sense of the word; though, of course, the town tenant-right, which did exist in some towns of Ulster, had no legal recognition. The sale was not the essential—it was a rare accident of the Ulster custom. The essential was the occupation at a fair rent; the occupation interest, the tenant-right. The sale was a striking, but rare incident. Transmission by will or intestacy, of the farm, with charges upon it to the full value of the right, was much more frequent, and quite as distinctive of the Ulster custom. The low rent—if such it was—of this letting by lease was intended to give the tenant a tenant-right interest, to meet the equitable claims of himself and his creditors. The claimant's father bought more than an interest in the lease—on the faith of the custom of the district, he bought an interest "beyond the lease," which, as a matter of practice, indulgence, or privilege, then prevailed therein,

but now existed as a matter of right. The performance of that practice or course of indulgence he now claimed to have enforced, as the Act directed.

The CHAIRMAN, in giving judgment, said that it was a case of great importance, and it was satisfactory to him to know that his decision would be subject to revision by a higher tribunal. The claim was a claim by a tenant on the expiration of his lease to recover from his landlord the value of his tenant-right interest in his holding. Now, it was not disputed that on that estate, if he were a tenant from year to year, he would be entitled to the tenant-right, and to full compensation for it on eviction; but it was held that no such right existed on the expiration of a lease. "It had been argued with very great power and ability on the part of the landlord that the covenant in the lease excluded the custom, and that even if it could be shown that as a matter of fact the land was subject to the tenant-right, still the granting of the lease was a contract to extinguish the custom. He could not hold that; he thought upon the evidence in the case the custom at the expiration of the lease was unaffected by the covenants in the lease, which only referred to the tenancy. The sale under the Ulster tenant-right often took place when the tenancy came to an end. He did not think that the fact of the lessees being at one time the owners of the lands, which they afterwards took by lease, and with the tacit understanding of the existence of the custom at the end of the lease, negatived the existence of the tenant-right. There had been a great deal of discussion as to the difference between practice and custom. They were nearly synonymous; because custom was only practice continued for a great length of time, and extending over a very great number of cases. Such a practice was deposed to by twelve or thirteen witnesses, that at the expiration of a lease there was a re-valuation of the land, at the customary rent paid by yearly tenants, and the tenant whose lease had expired was offered the land at that re-valuation, and he invariably took it. That was stated to be the custom by numerous witnesses, amongst them three agents over very extensive estates; and there was no evidence whatever to contradict it. It was admitted that it was the practice throughout that part of Ireland that on the expiration of the lease a fair re-valuation was made, at a fair rent; and the tenant was offered the land at that re-valuation. That practice was a custom—it was part of the Ulster custom now legalized. The leaseholder was now entitled to the benefit of that re-valuation—and of the tenant-right interest which such a re-valuation would confer upon him. It was true that in no instance on this estate had it been proved that the landlord, at the expiration of the lease, had



actually paid a tenant for his tenant-right. This was impossible. The tenant had always continued in occupation; and he afterwards sold when it suited himself. He did not suppose that this view of the question would be disputed, namely, that once a valuation of the land, at the expiration of a lease, had been made, and once the tenant accepted the land at that rate, he became entitled to the tenant-right; the re-valuation was part of the custom—an essential part in such cases. Upon the best consideration he could give the case he felt it his duty to decide in favour of the claimant. He would not give at all an extravagant sum, because he did not think the claimant was entitled to it. He would give £300.

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JOHNSTON v. TORRENS.\*

*Evidence of the leasehold tenant-right on an estate, two miles distant, is not evidence that respondent's estate is subject to the custom.*

This was a claim for the benefit of the Ulster custom at the expiration of a lease. The lease was made on the 13th September, 1844, by the Hon. Chichester Skeffington, first part, John M'Connell, second part, and Malcolm Johnston, predecessor of the present claimant, of the third part. It was a lease of 15 acres and 2 roods, plantation measure, of the lands of Ballynafeigh, which are at the present time under the recent Borough Act, within the borough of Belfast. It was then, and is now, a nice compact country farm. The rent reserved in the lease was £39 7s. This lease recited that John M'Connell was devisee and executor of Robert M'Connell, that Robert M'Connell was the tenant from year to year, that he fell behind in his rents, and the landlord brought an ejectment in the Superior Courts, and that the judgment against him, with costs, amounted to £119 18s. 11d.; and that after the judgments, and before the making of the deed, this John M'Connell died, devising his tenant-right interest in the farm to his son John, whom he made executor. His son John joined in this deed; and, in consideration of the payment of arrears of rent and costs, amounting to £119 18s. 11d., this lease was granted by the then landlord to Malcolm Johnston, whose widow was the present claimant. She

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\* Downpatrick Land Sessions, 19th June, 1872; before R. Johnston, Q.C.

held on until the termination of her lease, which expired in May, 1871. Possession was demanded in April, 1872. An ejectment was lately brought before the Belfast Recorder's Court by the Hon. Chichester Skeffington, and a decree given for possession.

John M'Connell was examined, and deposed to the fact that it was the custom on these lands to allow the tenants to sell. Was not aware that the custom did not exist on any portion of those lands. His father, Robert M'Connell, held those lands, and he got permission to sell. He did sell about seven acres to a man named Sneed, and got £200 for his tenant-right interest in it. [The assignment was produced.]

Samuel M'Causland, J.P., Belfast, deposed that he purchased a leasehold interest from Mr. Sneed of the lands, containing eleven English acres. He paid £2,300 to the Marquis of Donegall for the fee, which was upwards of £200 an acre for the land.

James Kennedy, J.P., said he had lived beside the lands in question for about the third of a century, and had seen the tenant improving them and draining the lands, and evidently spending a great deal of money on the property.

The CHAIRMAN.—The lands are about two miles from Belfast, and are used as a regular farm.

Examination resumed—There is about 178 acres of Lord Donegall's ground let in Ormeau Park. There are eighty or a hundred acres let in perpetuity on Lord Donegall's estate. He understood that the custom of a tenant selling his interest on Lord Donegall's estate always existed. Witness thought that the value of the lands in question was about £20 per English acre. At the old rent Mrs. Johnston, in his opinion, ought to get about £15 to £20 per acre.

It was further proved that there were no leases on the Donegall estate in Co. Down. Two or three witnesses proved that the custom was for a tenant to continue in occupation at the end of a lease. One witness stated that on Mr Batt's estate, two miles off, a tenant had sold at the expiration of a lease,

*O'Rorke*, for respondent, argued that the tenant-right was barred by the covenant in the lease, and cited the appeal cases of *Nancy Murphy v. Earl of Ranfurly*, dismissed by Keogh, J., and *Ellison v. Mansfield*, dismissed by Lawson, J. No proof had been given of the custom on the respondent's estate, and they could not go beyond it.

*Donnell*, for claimant.—The cases cited were dismissed on the evidence, not on a point of law. Here the evidence was sufficient. No leases had dropped on the estate or in the immediate neighbourhood, but on Mr. Batt's estate, where they had dropped, evidence had been given. The custom of sale on the determination of a yearly tenancy by notice to quit, and of a lease by expiration of the term, were identical. It was for the respondent to rebut the presumption that this holding was subject to the custom. That had not, and could not, be done. The sale to Sneyd, and the making of the lease under which claimant held, were tenant-right transactions. Evidence of a custom as to leases could not be given from a district where no leases existed. *Lex non cogit ad impossibilia*. The best possible evidence had been given, and it established the leasehold tenant-right.

The CHAIRMAN.—No proof from the estate of the respondent having been given of the leasehold tenant-right, I must dismiss this claim. I hold that the evidence from the estate of Mr. Batt, two miles off, is not sufficient proof that this holding is subject to the custom.

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WALLACE v. M'CLELLAND.\*

*Proof of the tenant-right custom in the case of leases on adjoining estates held insufficient when it is proved that the respondent had denied tenant-right.*

This was a claim for £300, the value of the tenant-right of 9 acres, 2 roods, and 27 perches, held by an old lease for lives made in 1790, the last life in which died in December last.

Mr. Francis Mulligan examined.—I know the lands surrounding Clay. I was executor of Richard M'Brin, who lived on Mr. White's property, which adjoins claimant's; and Mr. White permitted me to sell the tenant-right, and distribute the proceeds amongst M'Brin's family. The farm contained 9 acres, and was held for M'Brin's life. After his death, Mr. White noticed me that he would raise the rent from £2 2s. to £2 4s. per acre. I sold the farm at the rent of the neighbourhood, £2 2s. an acre. Mr. White accepted the purchaser, who paid for it £24 10s. an acre.

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\* Newry Land Sessions, 2nd July, 1872; before R. Johnston, Q.C.

The custom on the Marquis of Downshire's estate is, that when a tenant's lease expires, his rent, if lower, is raised to the current rent of the estate, and the tenant can either sell or continue on at this rent.

Cross-examined by *Frazer*.—I do not know of a lease extending over three or four lives having been made the subject of such an arrangement as I spoke of.

John Porter examined.—I hold land both under Mr. Finlay and Mrs. Law. I held land in the townland of Clay from Mrs. Law, under a lease. It was a long lease; and when it dropped, Mrs. Law reduced the rents to 36s. per acre, the same as the other tenants. This was during the famine. I could then have got £22 10s. an acre, but would not take that for it now. I hold land under lease, and land from year to year. The latter is held at a lower rent. I think the land in question would sell for £25 per acre. The custom in our portion of Clay is to let the land at 36s. per acre when the lease drops: this allows a tenant to get £22 10s. per acre for his tenant-right.

George William Beck.—I hold land in Brague, the next townland to Clay. My father held land under lease, whether for one life or three I cannot tell. It was an old lease, and the rent was 14s. an acre. The lease dropped, and we still occupy that land. I purchased tenant-right myself for £22 10s. an acre. The rent was £2 2s., and the place was held on an old lease, of which there were two lives unexpired. The tenants from year to year do not pay as much as £2 2s. I think the tenant-right of Wallace's land would be worth £25 or £26 per acre.

Cross-examined by *Frazer*.—If my lease dropped now, my rent would be reduced from £2 2s. per acre to 36s.

Then why don't you give up the lease when you would be better without it?—It is not customary to give up a lease.

Mr. Thomas Howe, agent of the Marquis of Downshire, examined by *Donnell*.—I am about 13 or 14 years connected with the estate. I was well acquainted with the late agent, Mr. Filgate, and knew his mode of dealing with the estate.

Is it the fact that the existence of a lease makes no difference in tenant-right on the Downshire estate?—As a rule, the tenant is allowed to continue in occupation of the farm. As a general rule, the tenant would be allowed to hold his farm at such increased rent as might be agreed on at the expiration of a lease.

*Frazer*, barrister, for respondent.—No evidence has been given of a tenant-right of any sort on this estate. There is no proof of the tenant-right on this holding, as required by the Act. The tenant had let in con-acre, which was contrary to the covenant in his lease against assignment. His rent had been reduced, during the whole period of the lease, on condition that he fenced, drained, and planted trees as required. The covenant in the lease was to deliver up the farm at the end of the term, and this was absolutely repugnant to the claim made in this case. He had received all he had bargained for, and he got his rent reduced in consideration of the improvements. Mrs. M'Clelland put out other tenants when their leases expired, without her giving or their claiming any compensation.

Elizabeth Anne M'Clelland, examined by *Frazer*.—I am owner of this land since 1856. I have known Wallace about 30 years. The late Robert Wallace had two 10 acre holdings. I did not put him out against his will. He voluntarily surrendered at the end of his lease. The present claimant did not live on the land until recently. His father let the land in con-acre, without my consent. He commenced to do so in 1863, and continued it until 1870. There had been trees on the farm, which, during the occupation of the Wallaces, were cut down, contrary to the terms of a covenant in the lease. Although bound by the lease to do so, he did not plant any trees on the farm.

John Dickie deposed that Robert Wallace was in the habit of setting his land by con-acre. He used to let it by auction from year to year for about seven years. Witness took some land from Wallace by con-acre. He did not put any manure on the field, but took as much as he could out of it.

Cross-examined by *Donnell*.—Mrs. M'Clelland used to let the land in con-acre herself. I took land from her. She once cautioned me against taking the land from Wallace. That was because his rent was unpaid.

*Donnell*, for the claimant.—Letting in con-acre is not breach of a covenant against alienation (*Booth v. M'Manus*, 12 I. C. L. R., 419). Even if it were, breach of a covenant during the tenancy is not inconsistent with a custom dealing with compensation after the tenancy (*Holding v. Pigott*, 7 Bing. 478). But the Ulster custom abhors forfeiture. There is no proof that the tenant-right

is forfeited by a breach of covenant. Unless this proof is given, the presumption is that the covenant attaches (*Fleck v. Lord O'Neill*, ante, p. 188). The respondent's property is not an estate. It only consists of 40 acres. There could be no certainty as to a custom on so small an area. \* On every side of her property, on small and large estates, the leasehold tenant-right custom prevails. The presumption is, it obtains on hers; and especially must this be held at the time when the lease was entered into. That she put out two tenants without compensation was arbitrary violation of the custom, when it was unprotected by law. The object of the Act was to prevent such violations.

The CHAIRMAN, in giving judgment, said :—The claim in this case is for £300, being the value of the claimant's tenant-right in a farm of 9a. 2r. 27p., Irish plantation measure, which he held under the respondent, and which sum he alleges he is entitled to claim, under the Ulster tenant-right custom. It appears that in the year 1790 a lease for three lives had been made to one of the predecessors of the claimant; that the lease expired in the month of December last, and that in the month of January a notice was served on the claimant by the respondent, demanding possession of the premises, and cautioning the claimant against putting any crop in the ground. It appears that the claimant paid no attention to that notice, but proceeded to crop the land. The respondent then brought an ejectment to recover possession of the premises, and the claimant filed the present claim under the Land Act. It appears that this is a very small property, consisting of about 40 acres, surrounded by large estates. Evidence has been laid before me of several instances in which, on the adjoining estates, tenant-right has been allowed on the expiration of a lease, but no such usage has been proved to exist on this small property. On the contrary, it has been proved that another farm on this estate was taken from the claimant without any tenant-right having been claimed or allowed. I am, therefore, of opinion that there is no usage on this property to deprive this lady of her right to resume possession of her land under the covenant in the lease, without being subject to the payment of any sum for tenant-right. I have been called upon to suspend the decree in ejectment until such time as an appeal can be disposed of. I can see no grounds for that when the claimant got notice not to crop the land.

## NELSON v. CALDWELL.\*

*The Ulster custom attaches to leasehold interests. Where the estate is small, the district usage will prevail.*

The claim in this case was for the benefit of the tenant-right custom.

*Dickie* stated that the claimant, some sixteen years ago, rented this farm on a lease for ten years. It then consisted of sixteen acres, at a rent of £16 a year. At the expiration of the lease he got six additional acres, and the rent was increased to £30 a year. The term of the claimant's lease having expired, his landlord sought to evict him, and he sought compensation under the Ulster tenant-right custom. It would be proved that the custom prevailed, and was acknowledged in the claimant's immediate locality, and all through the surrounding country.

Evidence was given to this effect, and also that the tenant-right was acknowledged in the district, in the case of leasehold interests.

*J. Wilson*, for the respondent:—The Duke of Abercorn, the landlord, permitted tenant-right on the part of his estate held in fee, but he never permitted it on the lands of Ardstraw, of which he was himself the tenant under the Bishop of Derry. The respondent was a sub-tenant, and as the immediate tenant had never acknowledged the right, the sub-lessee was not bound to acknowledge it. When such was not the usage of the estate, the respondent was not bound by any usage that might exist on adjoining estates. The words in the first section of the Land Act, bore upon the question, "in the case of any holding in the province of Ulster proved to be subject thereto."

*C. Moore*, replying for the respondent, contended that, where a landlord had never admitted the principle of tenant-right, no right could be created by this Act, and that the whole matter depended on estate usage, and not upon district usage. The respondent had never admitted the custom, and, therefore, was not bound by it.

*L. H. Bland, Q.C.*, held that a lease was subject to the tenant-right, and that in the case of small estates the district usage attached to the holding, and, therefore, he decreed the respondent in £100, less one half-year's rent now due, with £2 witnesses' expenses, and the usual costs.

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\* Land Claim, Strabane Sessions, 11th April, 1871; 5 IR. L. T. REP., p. 116.

## JOHN MOOR v. SAMUEL WATSON.\*

*Evidence of the custom existing on the surrounding estates is admissible to prove that a claimant's holding, which had at one time been formed by the respondent, the owner in fee of this and tenant of an adjoining farm, is subject to the custom.*

The claim was brought in this case for £400, under the Ulster custom. The farm in respect of which the claim was lodged, was originally held in fee by the claimant's father, who sold his interest to William Moor. On his death the farm was bequeathed or it came by descent to Nehemiah Moor, and under this gentleman the present claimant 32 years ago came into possession without fine at a yearly rent of £20. He reclaimed a portion of it, and improved it by fencing and draining. The representatives of Nehemiah Moor sold the fee-simple to Watson, the respondent, and on receiving the conveyance, he brought an ejectment and evicted the claimant, who now claimed the value of the tenant-right.

After hearing evidence of the custom, necessarily drawn from the surrounding estates, and as to the value of the farm,

*Lane*, for the respondent, submitted that this being freehold property, and always in possession of the owners, the tenant-right custom did not arise, and therefore the provisions of the Act did not apply.

The CHAIRMAN—You mean that this being freehold property, and in possession of the owners in fee, it never was subject to tenant-right. Of course the custom does not exist in the case of those who are owners and occupy the property themselves. It is not necessary that the custom should arise in their case. But if there is any portion of the property not occupied by the owners in fee, then that portion in the case of a property, so insignificant in extent as the respondent's, would be bound by the custom existing on the adjoining estates, unless it be shown by acts or dealings of the respondent, the holding is exempt from a general custom proved to exist.

A gentleman in court rose, and said he would tender £200, inside fifteen minutes, if he got the farm.

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\* Londonderry Land Sessions, April, 1872; before J. C. Coffey, Q.C.



The CHAIRMAN—I don't mind a settlement of the kind—have you the money?

(Witness)—I have, in Bank, and will pay it into court within an hour.

The CHAIRMAN—Mr. Lane, what do you say to that?

Mr. Lane—Mr. Watson intends to add this portion to another farm, and I am not in a position to accept any offer.

The CHAIRMAN—As no conflicting evidence of value is offered, then I award the claimant £150.

### DENIS LYNN v. GEORGE KNOX \*

*A tenant in occupation, though legally a trespasser, at the passing of the Act is entitled to tenant-right, the custom being proved which permits the tenant in such a case to sell.*

*Evidence of the custom in the adjoining district is receivable as primâ facie proof in the case of lands forming part of small estates.*

M. Henry, for claimant. The claimant's tenancy had been determined before, but he continued in possession until after the passing of the Land Act. The claim was under the custom. The custom was to allow persons whose tenancy had been determined, but who continued in occupation, to sell.

Henry Wiggins, J.P., agent to the Grocers' Company, said, on the estate over which he acted as agent, in the case of a tenant who was properly on the books, he would be allowed to sell, although his tenancy had been determined by service of a notice to quit.

Several other witnesses were examined, and gave evidence of a similar character in reference to other adjoining estates, which were contiguous to and surrounded the holding in question.

The case for the claimant having closed,

Crawford M'Cay, for respondent, submitted that Lynn, who was not a tenant at the passing of the Land Act, was simply a trespasser, and therefore the provisions of the Act did not apply in his case.

\* Londonderry April Land Sessions, before J. C. Coffey, Q.C.

The CHAIRMAN—No doubt, in the case of a tenant who has been served with an ejectment or notice to quit, the moment demand of possession is made or that notice expires, if the tenant does not give up possession, he is a trespasser. The service of an ejectment establishes a legal right to possession instead of using the stronghand to force it. Lynn was a trespasser from the day the notice to quit expired; but then, if a custom is proved to my satisfaction, which, notwithstanding his being in that position as trespasser at common law, permits the tenant to sell his Ulster custom interest in his holding, I must give force to that custom in accordance with the judgment and opinion of one of the most eminent of the Judges in the superior Courts—I refer to the ruling of Chief Justice Monahan. If that custom existed before the passing of the Act, what he was privileged to do then, though incapable of enforcing that privilege by law, he has now legal authority to do under this Act of Parliament. Then the question now before me is this—Have I evidence before me that a custom existed entitling a tenant to compensation, although the tenancy had been determined and the tenant had become a trespasser at common law? In my judgment, I have ample *prima facie* evidence. I have the evidence of Mr. Wiggins, whose veracity no gentleman would venture to impugn, and who was agent over very extensive estates. He tells me that this custom does exist upon several estates, including the large estates of the Grocers' Company. It seems to me that the custom exists in all the various tracts of country in this neighbourhood of allowing the tenant to sell, although his tenancy has been determined by the service of a notice to quit.

*M<sup>r</sup> Cay*—I will examine witnesses to show that the custom does not exist on this particular estate.

The CHAIRMAN—That won't do in the way you put it. This property is bound by the custom existing on the surrounding estates, unless you are in a condition to show that this particular holding was not subject to the Ulster custom of the district when the Act passed. If you can do this, of course it is exempt from its operation.

The case for the claimant closed.

George Knox, the respondent, was called and examined, and stated that he succeeded his father as owner of this estate in 1853.

Since that period he never knew of a tenant under notice to quit getting liberty to sell. Before the Land Bill passed there was a custom of allowing five years' purchase as between tenants.

Thomas Colhoun, J.P., agent to respondent, said he was not in a position to rebut the evidence given as to the custom of the adjoining estates.

The CHAIRMAN said he was of opinion that the custom was substantially established, and that custom was power to sell to the highest and best bidder, who, however, must be a tenant on the estate. Otherwise there was no restriction as to the amount.

He therefore gave a decree for the fair value of the tenant-right, which could be had from tenants on the estate.

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#### KEOWN v. LORD DE ROS.\*

*A tenant under the Ulster custom quitting voluntarily may claim, in respect of a right under the custom, and this without surrender. The prescribed time in such case is before the tenant quits, or within one month afterwards.*

*An estate rule, acquiesced in for a reasonable length of time, is an usage legalized by the Act.*

*A holding, forming part of the town-parks of the estate, on which no proof of the custom is given, is not subject to the custom.*

*Semble — A rule of a landlord against which the tenants protested would not establish a new custom.*

*Butt, Q.C. (with him Donnell).* The claimant was not served with notice to quit, but being desirous to voluntarily quit his farm, he proceeded to sell his tenant-right. He alleges that the Ulster tenant-right custom prevails generally on the respondent's estate, and that under that custom a tenant quitting voluntarily is entitled to sell his interest to a solvent and respectable tenant, without let or hindrance by the landlord. The claimant accordingly advertised the farm for sale on the 18th November last, and notices were posted in the neighbourhood of Strangford through the agents of

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\* Downpatrick Sessions, 1st Jan., 1872; before Robert Johnston, Q.C.; 6 IR. L. T. REP., p. 52.

Lord de Ros, which stated that no permission was given by Lord de Ros to the claimant to sell, and that legal proceedings would be taken to remove any person that would be found in possession of the said farm. Permission was afterwards asked to sell either by public auction or private sale, and refused. Accordingly the tenant brought this "claim in respect of a right" (sec. 16). The custom has been interfered with by the landlord. The statute distinguishes between a claim "in respect of a right" and a "claim for compensation." This appears from sec. 16, from the forms of claim and of decree under the Ulster custom, given in the judge's rules. That right was interfered with by the notice, which put an absolute veto upon the sale. The tenant could sell his yearly interest—Lord de Ros could not prevent it—but it could not be possibly expected that any person would come forward to buy a lawsuit, and accordingly no person bid when an auction was called. Whether that claim could be possibly enforced in any other way, such as by a bill in equity, it is plainly to be enforced by the peculiar tribunals to which the statute had entrusted the execution of the Act. By the 23rd section the decree might be enforced by attachment or otherwise, in the same manner as if it were in the Superior Courts of Common Law at Dublin. Assuming that the custom was established, there could not, upon the statute or the judge's rules, be the slightest difficulty in coming to the conclusion that the claim could be enforced by decree for specific performance, to which the custom entitles the tenant, and that the Court could make that decree. The rules, owing to an inadvertency of the judges, might create a little difficulty, but not an insuperable one. The 16th section expressly states that the claim must be made within the prescribed time, and the fourth rule provides that the limit of time within which the claim could be made was before possession has been given up, or within a month after. The plaintiff's claim has been served within the proper time, because it was served before the plaintiff had left his farm. The limit on one side is when the right arose; on the other side, it is on quitting, or within a month afterwards. The words of sec. 16 are "*within the prescribed time*," pointing to the limit within which the claim is to be made, not when its beginning arises. Even if no time was prescribed the right would not be taken away. *Lex non cogit ad impossibilia*. The general custom of the district is an unlimited right of sale. It lies

then upon the respondent to show that there is something to take this particular farm out of the general custom, now by a declaratory Act made the local law of the district. We claim an unlimited right of sale. The right of sale in itself implies the right to get the highest price. It was stated that Lord de Ros of late years had, as a landlord, imposed restrictions upon the number of years' purchase which could be obtained for a farm; but that action interfered with the ancient custom that previously existed; no modern usage could control or restrict an ancient custom except the tenant had entered into a specific contract to that effect with his landlord. The usages which prevailed in the province of Ulster were ancient, and the modern usages testified to the ancient right, and although modern encroachments might have interfered with the ancient right, the modern encroachment must be rejected, and the ancient right prevail. The legalization of tenant-right is a declaratory enactment—the words of sec. 1 are “hereby *declared* to be legal,” and had, therefore, a retrospective operation. The Act took under its protection the ancient tenant-right, and made it as sacred and enforceable a part of the law as gavelkind was part of the law of the county of Kent.

*Murland*, for the respondent, submitted that the tenant had no *locus standi*. Lord de Ros had done nothing to disturb the tenant, or entitle him to make a claim. The notice was not a disturbance. The Act contemplated nothing but compensation. The preliminary sections had the general heading, “*Law of Compensation.*” A claim, by sec. 16, must be served within the prescribed time, and the rules had not fixed a limit in a case of this sort.

The CHAIRMAN held that the claim was maintainable under the rules, in the form in which it was presented to him in this case. He was clearly of opinion that the case could be gone into. It was now for the claimant to prove the existence of the custom, which was disputed by the respondent.

The evidence established the fact that at one time all over the country, and at present generally in the district, the custom was an unlimited right of sale. Of late years Lord de Ros limited the price to £10 an acre.

The CHAIRMAN—The fact of Lord de Ros limiting the sale to £10 is a very important fact. The view I take of it is that whatever you voluntarily allow your tenants the law now obliges you to

give them, and nothing more; and surely if that has taken place on the estate for twenty years I could not go beyond that.

*Butt*—That may be a rule imposed on the tenants, and not a voluntary usage submitted to on their part. In the case put it would require a general acquiescence of the tenants to make the practice legalized. The Act of Parliament goes in between the landlord and the tenants, and says the Ulster custom must be respected. If the tenants recognized that new custom and acquiesced in it the case was altered.

The CHAIRMAN—I hold that the Act of Parliament legalizes the custom which has existed on Lord de Ros's estate for the last twenty years.

*Butt*—I would say that the Act never contemplated legalizing violations of the custom by the landlord.

The CHAIRMAN—But it was acquiesced in.

*Butt*—I admit if there was a general acquiescence of the tenants in it you might hold so. But if the landlord ruled with a high hand, and if the tenants said to him "you are breaking through the custom," could you say that that established a new custom?

The CHAIRMAN—In that case the landlord committed himself.

*Butt*—And I think there would be grounds for an action against him.

The CHAIRMAN—But to follow the argument, if the tenants did not protest against the landlord's action.

*Butt*—How could they protest? Silence is not acquiescence. Let the landlord show a general acquiescence on the part of the tenantry; but otherwise the argument of acquiescence cannot be conclusive as destroying an ancient custom. If the right of fishing existed, one or two cases of improper conduct on the part of some men would not destroy the right. Nothing can destroy a custom but the general acquiescence. One or two isolated cases will not do.

*Murland*, for the respondent, said there existed on the estate in question the custom of allowing £10 per acre; but there was another point of more importance, for on it he meant to rest his defence, and that was that those parts of the estate on which these lands were situated were town-parks, on which no tenant-right had ever existed.

Lord de Ros, examined by *Murland*—I am owner of the Strangford estate. Those lands were always known as town-parks, and

never known as anything else. It was in February '51, that the claimant got this farm. Tenant-right is never under any circumstances permitted in what are known on my estate as the town-parks. [The proposal of the claimant for the purchase of the lands in 1851 was here handed in, and was headed "town-parks."] There was never a question about the absence of tenant-right on the town-parks.

Cross-examined by *Butt*—Keown's farm is 200 paces from Strangford. It is used as ordinary tillage land. When a new tenant comes in there are printed forms to fill up of proposals. It is the same form in the country farms.

*Donnell*, for the claimant—The usages legalized in the Act are not the estate rules, which are not "prevalent in the province of Ulster," nor are "known as the Ulster tenant-right custom." The usages coming under that designation are the various usages existing all over the province, such as the right of sale by a tenant quitting voluntarily, the right of compensation when a farm is resumed by the landlord, the right of sale by public auction, the right of sale by private contract. These are all prevalent in the province; all known as the Ulster tenant-right custom. It is a misapprehension to imagine that Parliament, by using the plural form, intended to legalize estate rules. That opinion is widely prevalent, but is unfounded. The ancient customs in all their varieties were alone intended to be legalized—not modern restrictions. The whole language of the section shows that. A usage must be of voluntary growth. An arbitrary restriction is not an usage. Again, the words "declared to be legal" show the retrospective intention. Language could not be clearer to exclude estate rules. An arbitrary restriction to so much an acre is unreasonable. Improvements vary and may exceed the rule by any amount, and the improvements form one of the bases of the custom. Restrictions on prices are unreasonable, contrary to the modern policy of legislation. Buyers and sellers are the best judges of their own interests. No third party can easily regulate prices. The old statutes of labourers endeavoured to do this, and they have been repealed. Acts of Parliament attempted to settle the price of corn. They have all been swept away. Again, it is impossible to distinguish between Lord de Ros's town-parks and the rest of the estate. There was nothing to warn Keown that the lands he took were not subject to

the general custom. That Lord de Ros told his bailiff to tell him so, is no proof of knowledge. The exemption should be clearly proved.

The CHAIRMAN said that his view of the Act was, that whatever practice prevailed for any reasonable time previous to the passing of the Act, and not imposed in contemplation of the Act, was the tenant-right legalized upon that estate, no matter what the tenant-right might be in the district round about. If anything had been proved clearer than another, and with a wonderful degree of accuracy and precision by Lord de Ros, it was this, that for nearly half a century—indeed he was supported in a great degree by some of the witnesses for the claimant—the only tenant-right on his estate was the right to sell for a sum not exceeding £10 an acre, with a preference always to an adjoining or some other tenant of the estate, and in default of these, he admitted the reception of a stranger. It appeared a fair and salutary rule; it was adopted on other estates with which he was familiar; and he had no doubt that it was the custom legalized by the Act. He was equally satisfied that this farm was part of the town-parks, and not subject to any tenant-right. He held that whatever practice prevailed on an estate for a reasonable time with the acquiescence of the tenantry, was the custom which the Act legalized, and no other, and they were not to go back to whatever might have been the custom of Ulster fifty years ago. He was clearly of opinion that this was a town-park, and not subject to any tenant-right whatever, and he must therefore dismiss the claim.\*

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#### KENNEDY v. BENNETT.†

*A tenant who is improperly interfered with by his landlord in the exercise of his rights under the custom, may claim the specific benefit of the right or the value of his tenant-right.*

The claimant in the case said that the lands held by him were held subject to an usage, known as the Ulster tenant-right custom, whereby the tenant in occupation was entitled to sell his interest in the farm, subject to the rent at which it is held, or such rent as will not encroach on the said interest, to a solvent tenant; and the claimant, alleging that he was about to quit his holding, proceeded to sell by auction his interest or tenant-right; but the defendant

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\* This was not decided as a matter of law, on the 15th section; but on the ground that "the town-parks" on Lord de Ros's estate had, as a matter of fact, never been subject to tenant-right.

† Downpatrick Land Sessions, 19th June, 1872; before Robert Johnston, Q.C.



did deter intending purchasers from bidding, by stating that he would close up a farm road connected with such holding, and flood a portion of such holding with water if he wished, and by these and similar statements did prevent the claimant from enjoying the benefit of the custom ; and the claimant claimed £1,000 as payable to him under said usage, that sum being the fair value of the interest under that right.

The respondent filed a notice alleging that he never disputed that the claimant's holding was subject to the Ulster tenant-right custom, and never disputed his right under that custom, and the claimant had always full liberty from the respondent to sell such holding pursuant to such custom, and the respondent denied that he did anything to violate that custom in relation to such holding as entitled the claimant to claim the above sum of £1,000.

*Donnell*, for claimant:—This was not a case of eviction by the landlord. No notice to quit had been served, or proceedings of eviction taken. This tenant, who held this land under the Ulster custom, had a right to sell his tenant-right. He asked the declaration of the Court that the lands in question are subject to the Ulster custom. The claim went on to state certain infringements of the custom on the part of the landlord, and claimed a sum of money as compensation therefor. Into the latter portion of the claim he would not enter at present—he would ask that it be treated as surplusage. He asked that the admission contained in the notice of dispute be confirmed by a decree of this Court. The admission in the notice of dispute was of no use. This claimant wished to quit his holding, and in the usual way went to his landlord and asked to be allowed to sell, and the landlord stated that he had no objection. Accordingly, the tenant issued a hand-bill, headed “Farm of land for sale by public auction.” That was the usual language used to express a sale of the tenant-right. The respondent had only three tenants, who held admittedly subject to the Ulster tenant-right custom. Yet he proceeded on the day of the sale in an unusual way. He said he had made a road, and would not give it to the tenants, which he had a right to say. The road was a recent privilege, and he could withdraw it. He then went on to threaten that he could flood the land at any time, a thing which he had no more right to do than any other man in the community. The respondent was a miller, and his mill-dam

bounded a portion of claimant's land. By not lifting the sluice when heavy rain came he could flood a considerable portion of claimant's land. What claimant wanted was such a declaration of this Court as would prevent respondent repeating his conduct, and then, if respondent again attempted to interfere, he would come under the jurisdiction of this Court, and under its power of attachment.

Evidence to the foregoing effect was given by the auctioneer and the claimant.

The CHAIRMAN suggested that if the claimant wished to put the farm again for sale the landlord should point out exactly what rights he claimed, and if there was any interruption in the sale he would hold him responsible, for the landlord was bound not to interrupt or prevent the sale, the right to which was admitted by him, and if he did a decree could be given against him for specific performance, to be enforced if necessary by attachment, or for such sum as any other person would give, if it was proved; otherwise, the tenant-right custom would not be worth a farthing.

*Donnell*—That is the reason we come into Court.

*Dinnen*, for respondent—It was the bounden duty of the landlord to interfere with the sale when he found that his rights—important items—were left out of the advertisement. The claimant put his land up for sale without stating that the landlord had the right to flood, and without stating that the road was the property of the landlord. That advertisement was a fraud upon the public. The landlord was justified in interfering, and, therefore, he asked that the case be dismissed with costs.

The CHAIRMAN—You will have to give evidence of that.

The respondent was then examined, and deposed to the rights which he had over the farm, and which rights were not mentioned in the advertisement. On cross-examination, it appeared that he had not stated distinctly at the auction what rights he claimed, and he admitted that he meant to claim, and wished it to be so understood, a right to flood fields of the claimant's beyond the high-water mark traced in his own map.

The CHAIRMAN dismissed the case, but without costs, on the ground that the landlord had claimed a right more extensive than he now admitted he was entitled to, at the same time remarking that if the landlord attempted to frustrate the sale again he would hold him responsible if a new claim were filed and the fact of improper interference with the right sustained in evidence.

## STRONG v. CRAWFORD.\*

*A tenant quitting, without notice to quit served, and desiring to dispose of his tenant-right, but whose landlord desired to take the land into his own possession, is entitled to the fair value of his tenant-right.*

This claim was brought under the custom known as the Ulster tenant-right.

*M'Mordie*, for claimant.—The holding consisted of four and a-half Irish acres, and the claimant had been in possession for a period of fourteen years, and had purchased the tenant-right interest from the tenant preceding him in occupation. The claimant came to the conclusion of selling the farm, and, having signified his intention of doing so, several persons offered him £100 for it. Mr. Crawford said he would prefer to take the land into his own possession, and offered £50. This the claimant refused to take, and Mr. Crawford would not accept any other tenant. Under these circumstances the case came into Court.

Evidence was then gone into, and

The CHAIRMAN suggested, since the evidence did not show him whether the increased demand of the landlord was exorbitant or not, that both parties join in the expense of bringing down one of the firm of Messrs. Gale and Brassington, Dublin, who would set a fair value upon the land. He said it was a very difficult thing, indeed, to value land which he never saw. He was of opinion that Mr. Frazer had not shaken the testimony on the claimant's side of the case.

The respondent declined to accept the suggestion, and

The CHAIRMAN allowed £18 per acre—or £81 in all—as the value of the tenant-right.

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M'KENNA and Others v. JOHN LOWRY MONTEITH.†

*Riordan*, for claimant, said the respondent's estate is a small portion of the Blessington estate, on which there had been from time immemorial an unrestricted right of sale. The claimant

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\* Newry Land Sessions, July, 1872; before R. Johnston, Q.C.

† Omagh Land Sessions, 2nd April, 1872; before Sir Francis W. Brady, Bart., Q.C.

desired to sell his tenant-right interest, and got liberty from the agent to sell. A sale took place, and Cunningham, one of the present claimants, was the highest bidder, at £121. The landlord refused to accept the purchaser, it being understood that he preferred to give the farm to M'Dermott, an adjoining tenant. He had served a notice to quit, and if he desired to give the land to M'Dermott, he must pay the price a solvent purchaser was willing to give. The question substantially was, could the present respondent, by merely purchasing a portion of the Blessington estate, restrict the custom formerly prevalent thereon?

Various witnesses proved an unrestricted tenant-right on the Blessington estate.

*Dickie*, for respondent, said the respondent was always willing to allow his tenants to sell, but not by public auction. He (the respondent) never objected to sales by arbitration, but he preferred, in any case where an adjoining tenant was willing to purchase, to give that tenant the preference. M'Dermott, the adjoining tenant in this case, was willing to purchase the farm, and could it be supposed that a landlord would be obliged to have a tenant forced upon him when one of his own tenants was willing to pay as much as the stranger? In the notice of dispute the landlord says, "that he has a reasonable objection to the tenant proposed by the said James M'Kenna, and has brought this ejectment because said James M'Kenna proceeded with a sale of said lands notwithstanding said landlord's reasonable objection; and said landlord says that, in accordance with the said custom, he is willing to accept as tenant any of the tenants adjoining said lands; and, as they, or one of them, are, or is, willing to purchase said lands at such price as any two reasonable arbitrators may fix upon, the said landlord, in accordance with said custom, objects to a sale to any other person."

Ultimately, it was suggested that M'Dermott, the adjoining tenant, should pay to Cunningham £121, the amount paid by him for the farm to M'Kenna, and that M'Dermott should be allowed to occupy the farm as tenant. The solicitors for the claimants adopted this suggestion, and a rule was made accordingly. It was also ordered that the deteriorated or improved state of the land should be left to two arbitrators—Archibald Johnson and Wm. Ellison—and these two gentlemen to decide either the value of the

improvements or the loss occasioned by deterioration, and the amount of the purchase-money to be increased or diminished accordingly. Their finding was £25 for improvements, to be added to the £121.

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ROBERT PORTER v. JOHN SCOTT.\*

JANE and ROBERT PORTER v. JOHN SCOTT.

*Where the custom was one of unrestricted sale, and the landlord refused to accept the purchaser, being a solvent person, as tenant, and desired to give the farm to another, a decree was given for the fair value of the tenant-right, which was equitably assessed on the evidence before the Court.*

These two claims, which were heard together, were for the benefit of the custom, the landlord having refused to accept as incoming tenant the highest bidder, and notices to quit having been served.

Robert Porter's, the smaller farm, about which the dispute arose, was purchased, according to the allegation of the respondent, without the authority of the landlord. Respondent alleged that at the time this farm was purchased it was understood that a tenant, named Nutt, would get it; that a promise had been made to Nutt that he would get the first farm that would become vacant, and that although it was understood he would get this farm, Porter bought it contrary to the wish of the respondent. On behalf of the claimant, it was proved that he purchased the farm at a public auction, in August, 1870, for £106. Nutt attended the auction and competed for the farm. He offered £105, and he never told the claimant (Robert) that he might not offer as he would not get the farm. Evidence of the existence of the custom and of the value was given at considerable length on behalf of the claimant. Notices to quit both farms had been served.

The CHAIRMAN, in delivering judgment, said—The main point in this case is whether Porter can sustain his claim at all. I am of opinion that he can, and has sustained it. In giving judgment in these cases, I do

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\* Omagh Land Sessions, 2nd April, 1872; before Sir F. W. Brady, Bart., Q.C.

not intend to decide any rule that will be binding as applied to the Blessington or any other estate. I am only deciding these particular cases, and I am only deciding these cases according to the particular circumstances relating to them. I am of opinion that nothing took place at the time of the sale to prevent Porter bidding for the small farm or to prevent him being declared the purchaser. It has not been proved to me satisfactorily that notice was given to the claimant that he would not be accepted as tenant if he purchased this farm. Mrs. Scott, the wife of the respondent, has told us as much as she could on this point, but her evidence is not explicit, and, weighing it against the positive testimony given by the claimant, I could not act upon it. The bailiff, it appears, attended this sale, and the auction was allowed to proceed. We have evidence that Nutt, who was to have got the farm, not only attended the auction, but actually competed with Porter in bidding, which he need not have done if he thoroughly understood beforehand that he was to get the farm. We have evidence that Porter was not told at the time of the sale that the farm would be given to Nutt, and I think it is too much, under the circumstances, to ask me to hold that in point of fact such an arrangement existed. I am, therefore, of opinion that these claims have been sustained under the Land Act. I should prefer the parties would settle the matter themselves, but if they do not wish to do so, I give my opinion that the application of the Ulster custom has been established in both cases. There is a slight difference of opinion as to the value of these two farms. One gentleman, examined for the claimant, stated that the large farm is worth £500, whilst another gentleman, examined for the respondent, gives it as his opinion that the same farm is only worth £450. I will divide the difference, and I will award as compensation for the claim in this case a sum of £475. With regard to the smaller farm, the one that led to the dispute, there is also a difference of opinion with regard to its value. The value is fixed by the same witnesses at £120 and £110 respectively. As in the other case, I will divide the difference, and give a decree in this case for £115, with £3 10s. costs in each case.

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#### FRIEL v. LEITRIM.\*

*Where the tenant-right is proved to exist at the present time in the surrounding district, and up to the year 1854 existed on the respondent's*

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\* Letterkenny Land Sessions, 3rd November, 1871; before James Gibson, Q.C., 5 IR. L. T. REP. 187.

*estate, and the claimant came into possession under a tenant-right purchase, the Ulster custom will be held to exist so as to entitle the claimant to compensation.*

*To destroy or do away with the custom both parties must concur.*

This was a claim under the Ulster tenant-right custom for £350. The claimant had been served with an ejectment in April, 1871, founded on a notice to quit which had determined the tenancy in the November previous. The farm is situated about four miles from the town of Milford. It consists of 40 acres, most of it rough mountain land, at the annual rent of £6. About the year 1854 the father of the respondent was the owner of these lands. He was anxious to consolidate some of the farms, and, accordingly, he put the claimant's farm and the farm held by his brother Patrick into one. An arbitration was then made between the claimant and his brother, at the suggestion of the then Earl of Leitrim and his agent. The result of the arbitration was this—the present claimant got the consolidated farm, and, in consideration of the loss sustained by his brother Patrick, he (Patrick) was awarded a sum of £20 per *sum*\* for the nine *sums* taken from him and added to the claimant's farm. Since that time the claimant held the consolidated farm, and on being served with an ejectment process, he brought the present claim.

Evidence was given of these facts by the claimant. Wm. Reid, clerk of the Milford Union, and others proved that the tenant-right custom had existed on the Leitrim estate up to the death of the late Earl of Leitrim, and that it existed and exists on all the adjoining estates—Mr. Batt's, Sir James Stewart's, Mr. Norman's, Mr. Fawcett's, Mr. Martin's, and Captain Fenwick's.

*M<sup>c</sup>Conchy*, for the respondent, urged that the present Earl had not acknowledged the custom, and, therefore, could not be bound by it. The custom legalized was that existing at the passing of the Act. At that date it could not be said that the tenant-right existed on the Earl of Leitrim's estate. Since he came into possession, which was in December, 1854, he had systematically refused permission to sell. He had given outgoing tenants money to enable

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\* A *sum* is the local name for a quantity of land sufficient to graze a full-grown cow.

them to emigrate, but this was voluntary, and was not the Ulster tenant-right custom.

Evidence to this effect was given by Mr. Stewart and Alexander Russell, employed in the respondent's office.

*Donnell*, for the claimant, contended that this did not disprove the existence of the custom under which the claimant had come into possession. He had made a tenant-right payment on entering to carry out the landlord's idea of consolidating farms, and he had done nothing to divest himself of his right. The present Earl had received his estate subject to tenant-right, and with its benefits he must also accept its responsibilities. The first section was a declaratory enactment, and it retrospectively legalized the custom which existed when the present Earl came into possession of his estate. The arbitrary acts of the respondent, not acquiesced in by the claimant, could not destroy the custom. The arguments for the respondent might be applicable to tenants who came in under the *regime* of the present Earl, but did not apply to the claimant's case. The amount to be decreed must be £250, the sworn and uncontradicted value of the tenant-right (*Johnston v. Patton*).\*

The CHAIRMAN.—There can be no doubt that, in the barony of Kilmacrenan and in all the adjoining district, tenant-right prevails. The evidence is clear and distinct on the point. It is also clear and distinct that in the time of the late Earl of Leitrim, and up to the time of the present Earl of Leitrim coming into possession, the Leitrim estates were also subject to that tenant-right. Now when the present Earl came into the estate he took it charged with the tenant-right, and subject to all the equities between landlord and tenant which that tenant-right bestowed. The question then came to this—there were two parties interested—the landlord on the one side, and the tenant or his predecessors on the other—is it competent for the landlord, by any act of his own will, without the consent of the tenant, to alter the relation existing between them? It appears to me, in this particular case, and my observations are confined to this particular case, that the tenant has done nothing whatever to divest himself of the right which, by the concession of the late Earl of Leitrim, he had when he (the tenant) purchased the land. It appears that the tenant purchased this land, at the request of Lord Leitrim's father, in order to confer a benefit on the late Lord Leitrim by the consolidation of farms, which benefit the present Lord

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\* See p. 180.



Leitrim actually enjoys. I cannot hold that the tenant has done anything to divest himself of the benefit of that custom which did exist, and which is admitted to have existed at the time he purchased the land. What has he done? He is in possession up to the present time, or at least up to the time when he was evicted, and whatever right he had, there is no evidence that he divested himself of that right since he entered into possession of the lands. It has been insisted that the proposal admitted on the one part to have been signed, and denied on the other, made in 1861 to Lord Leitrim, of becoming his tenant, has affected his interest in the farm. Now, I quite agree with Mr. Donnell, and it suggested itself to my mind before he said anything about it, that this proposal is not at variance with the tenant-right, because it states that the tenant is not to assign, without the consent in writing of the Earl of Leitrim, which is not inconsistent with the tenant-right custom of selling with the consent of the landlord, and is indeed a distinct implication that the tenant did not surrender any right he enjoyed. It would not be competent for the landlord, by any effort of his own, to deny the existence of that custom, and denude the other of any right which he enjoyed. There must be a concurrence on the part of both. The landlord may make an effort to get rid of the custom, and the tenant concur, but, until there is this concurrence, my opinion is—the landlord cannot by his *ipse dixit* do away with the right which attached to the estate when he entered into possession. I hold the tenant has a right, as put forward in this claim, and I give £250 as compensation, with costs, and £2 witnesses' expenses.

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GALLAGHER v. LEITRIM.\*

*Where separate rent receipts are given in respect of house and lands, the house, being in a village, is outside the Act.*

*Section 15 does not apply to the Ulster Custom.*

This was a claim under the Ulster tenant-right custom for compensation in respect of a house occupied by a butcher in the town of Milford, from which he was being evicted, and for a field of land in the adjoining townland of Drumbrain. It appeared that separate rent receipts had been given in respect of the house and the field.

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\* Letterkenny Sessions, 8rd November, 1871; before James Gibson, Q.C., 4 IR. L. T. REP., p. 188.

The rent of the former was £4, of the latter £2 10s. per annum. The claimant alleged that two tenant-right purchases had been made of the house and field by his predecessors, and that it had been customary in the late Earl's time to allow the tenant-right in holdings in the village of Milford. •

Mr. Reid and others gave evidence of the existence of the town tenant-right. He had never heard of any lands in the town of Drumbrain called town-parks. Mr. Reid swore that the tenant-right of the house was worth £50, and that a low value for the field would be £12; to a highest bidder it might go for twice as much.

*Mr Conchy*, for the respondent, argued that the house and land must be considered distinct holdings, and that the house, not being agricultural or pastoral, did not come within the Act. The land was town-parks, and by section 15 was excluded from compensation.

*Donnell*, for the claimant, contended that section 15 did not apply to the Ulster tenant-right, which was left to be regulated according to the facts of the custom, as sworn to in evidence. The intention of the statute was to legalize the Ulster custom as it existed, not to restrict it in amount or operation. Besides the land was not town-parks, under section 15, wanting, as it did, one of the requisites of the definition, "ordinarily termed town-parks." The house, though used by a butcher, was also necessary for the agricultural purposes of the land, having a cow-house and barn attached. Both were substantially one farm (which was the true meaning of "holding" in the Act) and had been treated as such under the custom.

The CHAIBMAN.—The 15th section does not apply to the Ulster custom, the claim for which is in respect of a right. It is, however, necessary for me to decide this in the present case, for I hold that the tenant had two separate holdings, and that the house does not come within the Act; but for the field, which is proved subject to the custom, I give the value sworn to by Mr. Reid, viz., £12, with costs.

## STEVENSON v. EARL OF LEITRIM.\*

*An agreement not to assign, sublet, or part with the possession of the land, without the consent of the landlord, is not inconsistent with the tenant-right custom.*

*A proposal of tenancy, not signed by the landlord, cannot be availed of by him to deny the tenant-right.*

The following is a copy of the claim :—The said Rev. Samuel B. Stevenson claims the sum of £350, as due to him by way of compensation under the tenant-right custom, to which the following holding is subject, namely—the usage prevalent in the province of Ulster, known as the tenant-right custom, whereby the tenant in occupation, on being about to be evicted or disturbed by the act of the landlord, or to quit his holding, is entitled to sell his interest, commonly known as his tenant-right, in his holding, subject to the rent to which it is liable, or such fairly valued rent as shall be settled from time to time, to any solvent tenant to whom the landlord shall not make reasonable objection, or on the resumption of said holding by his landlord, or if his landlord has indicated his intention of resuming the same, is entitled to the value of the said tenant-right interest, as if sold to such solvent tenant, and the claimant having been served with a notice, dated 21st August last, to quit his said holding, and deliver up the same to the respondent, and the respondent having refused to permit the claimant to sell his said tenant-right interest, claims the said value under the said usage, and he is willing, and hereby offers to give credit for any sum which under the said usage ought to be deducted from the price, and he also is willing, and hereby offers to accept the benefit of the said usage and permission to sell his said holding thereunder, in lieu of the said compensation.

*Donnell*, for claimant :—In the year 1850 Mr. Stevenson entered into possession of these lands, having purchased the tenant-right of the previous tenant, B. D. Hewetson, Esq., with the approval of the then agent of the Earl of Leitrim, for the sum of £140. Of this sum £42 was paid into the office for arrears of rent. The rent was £14, and so it continued until the present Earl came into possession of the estate. His first act, on getting possession, was to withdraw from Rev. S. B. Stevenson a payment of £5 yearly, which the

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\* Lifford Land Sessions, July, 1871; before James Gibson, Q. C.

previous Earl had granted to him as minister of the Reformed Presbyterian congregation in Milford, and he afterwards increased the rent of the farm held by Mr. Stevenson to the sum of £18 15s. No further change occurred in the tenancy, except that notices to quit were almost annually served upon Mr. Stevenson; but in this respect Mr. Stevenson was no worse than his neighbours. Owing to the periodical service of these notices to quit, a system of terrorism prevailed in the whole district. The Earl of Leitrim worked his absolute will as he pleased, and no Land Act being then in existence to protect the Ulster tenant-right custom, no tenant dared gainsay or dispute his will. In the year 1867, a notice came to Mr. Stevenson requesting him to go to the office to sign some agreement. He went there, and was informed by Mr. Frood, agent, that there were orders for the tenants to sign a certain agreement; and the claimant, feeling himself entirely at the mercy of the Earl of Leitrim, consented to sign. That document was not signed by the Earl of Leitrim. Some time in the year 1869 Mr. Stevenson got a call to a congregation in Belfast, and he removed to that town, leaving his son in charge of the farm. In the year 1870 the Land Act came into operation. Protection under that Act being extended to the Ulster tenant-right, Mr. Stevenson sold his farm to a man named John Hunter, for the sum of £350. A respectful letter was written to the Earl of Leitrim (the present respondent) by Mr. Stevenson, requesting him to accept Hunter as his tenant. To that letter Mr. Nunn, the Earl of Leitrim's agent, replied, in a letter dated 28th November, 1870, stating that he was directed by Lord Leitrim to inform him (Mr. Stevenson) that he could not permit him to dispose of the lands, and called his attention to the agreement under which he held the lands, and in which it was stated that he should not sublet in any way, or sell, as if he did he committed a breach of the covenants in the said agreement. The respondent himself wrote on the 29th of November to Mr. Stevenson, refusing permission to sell the farm, but stated that he was willing to accept the surrender of the lands if Mr. Stevenson found it inconvenient to reside upon them. Under these circumstances, nothing remained for the claimant to do but appeal to the protection of the Land Act. The respondent served notice to quit in order to prevent the sale of the claimant's tenant-right, and thereupon Mr. Stevenson served his notice of claim. It will be proved

to demonstration that, up to the end of the year 1854, the tenant-right custom, viz., the right of sale, obtained on the Leitrim estate. Nothing can exempt those lands from that custom to which they were subject when Mr. Stevenson entered into possession, and paid his £140 for them. The agreement which he was forced to sign did not and could not destroy his tenant-right, although that agreement contained numerous clauses of the most stringent nature. Under that agreement the claimant was bound not to assign, sublet, let in con-acre or for crop, or subdivide for grazing, or part with possession of the said lands or any part thereof. There is no inconsistency between this and the Ulster tenant-right custom. The custom had not the force of a legal obligation when this agreement was signed. A mere non-alienation clause does not exclude the custom, and may be consistent with it. Under the custom a landlord has the option of making reasonable and fair objection to an incoming tenant, but the outgoing tenant has the privilege of sale. That is what is sought here.

*Holmes* opened the case for the respondent. He said—The question was whether this particular holding was subject to the Ulster custom. It is very possible, if that question is decided in the negative, the claimant can come forward hereafter, under other sections of the Act, to ask for compensation. What I say on the part of Lord Leitrim, and what has been entered on the pleadings of the Court, is this—that this farm is not subject to the tenant-right custom of Ulster. We allege that this farm is not subject to the Ulster custom, that it has not been subject to that custom for many years past, and that it cannot now, under the 18th section, be brought within that custom because of alleged unreasonable conduct on the part of Lord Leitrim. In point of fact, I am here to endeavour to sustain that this holding, before the passing of this Land Act, was not subject to the privilege which was then called a custom; that, since the passing of the Act, it has not become subject to the right previously given to the tenant, and, that being so, the conduct of Lord Leitrim cannot be taken into account as bringing the holding within the custom now. That 18th section in the equities clause can be taken into consideration on any claim brought forward afterwards under other sections of the Act, but it cannot apply on this point as regards the custom, for we deny that the case made for the claimant brings him within the terms of his claim, on

the ground that his holding is not subject to the custom. It is proved here that Mr. Stevenson obtained possession of the holding, in the year 1850, by paying a sum of £140 to the former occupier, but the effect of that payment, without the consent of the landlord, is not sufficient, pursuant to the terms of this Act, to make the holding subject to the custom. And now, let us come to the case of a farmer who held a farm previous to the passing of this Act, under circumstances in which it might be fairly considered he had all the advantages of tenant-right. Before the passing of the Land Act a tenant upon any estate in Ulster had merely a privilege. He had no right whatsoever. The landlord allowed him, without interference on his part, to sell to the highest and best bidder. On some estates there were certain rules and restrictions modifying that privilege. It is plain, then, that it was only a privilege. If a landlord, before the passing of the Act, said to a tenant, "I will not allow you to exercise that privilege," the tenant was bound at once to yield to the will of the landlord. It then follows, as I have said, that before the passing of this Act, the Ulster custom was no right, but merely a privilege. The will of the landlord was sufficient to put an end to the custom, for the custom being only a privilege granted by the will of the landlord, it was not necessary for the landlord to have the consent of the tenant to put an end to the custom which he allowed to prevail. The landlord being the person in whose power it was to bestow that privilege, once he said he would withdraw it, that was sufficient to put an end to it from that time forward. And so it was with Lord Leitrim. He could, without the consent of any tenant, before the passing of the Act, withdraw from him the privilege he hitherto enjoyed. Now that being the state of the law before the passing of this Act, I will assume that, in the year 1850, when Mr. Stevenson paid £140 for this farm, it was subject to the tenant-right custom. The then Earl of Leitrim, with the consent of whose agent that arrangement was made, died in the year 1854, and the present Earl came into possession in December of the same year. Now the evidence is this—Upon the present Lord Leitrim obtaining possession of that property, an entire change took place in the management of the estate. He let it be known by acts and otherwise from that time forward that the privilege of sale would no longer exist. And I believe every witness put upon the table has supplemented the evidence that, since the time the present Earl

came into power, that privilege or custom has ceased to exist. In fact, his determination in this regard was so notorious that, in the year 1858, a meeting, largely attended by the farmers in the neighbourhood of Milford, was held in that town to protest against his conduct in this matter. At that time it was understood that he had put an end to this privilege, and I contend that it was not necessary for Lord Leitrim, in pursuing that course, to have the consent of the tenants. In spite of the remonstrance of the tenants, he had power to withdraw the privilege, just in the same way as he would have the power to revoke "leave" or "licence" in regard to trespass. On that evidence alone I am entitled to a dismiss, on the simple grounds that, whether or not this holding was subject to the custom prior to the year 1854, after that date Lord Leitrim, by his conduct, put an end to that privilege. That is evident from the conduct of Mr. Stevenson himself in the year 1867. In that year he was required to go to the office to sign a certain agreement, which he states he would not have signed, but, feeling at the time, that he was completely in Lord Leitrim's power, he did sign it. That is not denied. It was in his power to say, "I will not sign that agreement." But what would have been the result of that? He would have lost his land. It is just like a man getting possession of property on condition that he will do certain things. He goes into possession in the face of his own agreement, and surely he is bound by it. Now, under the agreement signed by Mr. Stevenson, I submit, in the first place, that it is perfectly inconsistent with the terms of this agreement that tenant-right, such as it was understood then, and such as is put forward now in this claim, could attach to this holding. I submit that it was an agreement for valid and valuable consideration; and, although it was not signed by Lord Leitrim, I submit that there is perfect mutuality in the agreement itself. Counsel concluded a lengthened address by asking his Worship to decide that the holding was not subject to the tenant-right custom of Ulster; but if he was of opinion that the custom did attach, then his Worship would consider, in measuring compensation, the deteriorated state of the farm, and the dilapidated state of the buildings.

The CHAIRMAN.—This case came before the court on a claim for the tenant-right of 77a. 2r. 27p., Cunningham measure, lands situate in Rossgarrow, in this county, and held by the claimant, under the

respondent, as yearly tenant, at a rent of £18 15s. Of this quantity of acres fifteen were arable, and the remainder consisted of rough mountainous lands. It appeared in evidence that the claimant (who was a minister of a congregation of Presbyterians belonging to the Reformed Presbytery) purchased, in the year 1850, the farm in question from Mr Hewetson, who held the same farm, as tenant from year to year, under the late Earl of Leitrim, the father of the respondent, for the sum of £140. The claimant was accepted as tenant by the then agent of the estate, and has ever since been in possession of the lands. The rent which was then payable for this farm was £14 per annum, which was discharged by the payment by the claimant of £9 per annum, and an acknowledgment given by him to the agent for the sum of £5, which was allowed as a donation to the congregation by the then landlord. The late Earl of Leitrim died in the year 1854, and the respondent succeeded to the title of the estates. The allowance of £5 made by the late Earl to the claimant's congregation was thenceforth discontinued, and the rent of the farm which he held was subsequently raised to £18 15s. In the year 1867 a notice to quit was served upon the claimant, dated 6th April, in that year, requiring him to give up possession of the lands on 1st November thence following. On 26th August, 1867, a printed form of proposal to become yearly tenant of the lands was signed by the claimant, and on 24th September, 1867, he was called upon by the agent to sign a printed document, drawn up in the form of an agreement as follows :—"Memorandum of agreement made and entered into this 24th day of September, 1867, between the Right Honourable William Sydney, Earl of Leitrim, of Lough Ryan, in the County of Leitrim, owner of the farm, lands, tenements, and hereditaments, hereinafter mentioned, of the one part, and Samuel B. Stevenson, of Rosgarrow, the intended tenant of the same farm, lands, tenements, and hereditaments, of the other part. The said Earl of Leitrim agrees to let to the said Samuel B. Stevenson, and the said Samuel B. Stevenson, hereby agrees to take of the said Earl of Leitrim, all that messuage or tenement with the barns, stables, out-houses, yards, gardens, and appurtenances thereto belonging, and also all those several closes, pieces, or parcels of land or ground situate, lying, and being at Rosgarrow, in the barony of Kilmacrenan and county of Donegal, containing 77 acres, 2 roods, and 27 perches, statute measure, or thereabouts, be the same more or less, commencing from the 1st day November, 1866, as tenant from year to year, determinable by six months' notice to quit, ending on any or either of the gale days hereinafter mentioned, reserving to the said Earl of Leitrim, his heirs and assigns, all timber and other trees or underwood, moors, bogs, marches, seaweed, waters, watercourses, and all mines and minerals, stone, sand, gravel, and clay ;



and also reserving to the said Earl of Leitrim, his heirs, and assigns, all game, hares, rabbits, wild fowl, and fish, and the exclusive right to the said Earl of Leitrim, his heirs and assigns, his and their nominees, their servants and followers, of hunting, hawking, shooting, and fishing on the said lands and premises, and of carrying away the game and fish. The said Earl of Leitrim, and his heirs and assigns, shall have power to enter upon such land at any time for the purpose of viewing and surveying said lands and premises, searching for and with workmen, horses, and carriages, removing minerals and other matters herein excepted, and also to make roads, drains, and watercourses, as the said Earl of Leitrim, and his heirs and assigns, shall think fit, and for all other reasonable purposes whatsoever, but making all reasonable compensation for actual loss or injury to crop or meadow, occasioned by any such entry. And the said Samuel B. Stevenson doth hereby agree to pay for the same the yearly rent of £18 15s. 0d. sterling, payable half-yearly, in equal sums, on the 1st day of May and the 1st day of November in every year, over and above all taxes, poor's rate, and other charges imposed, or to be imposed thereon, and also to pay such increased rent as is hereinafter provided, the first-half year's rent to be due and payable on the 1st day of May, 1867, and the last half-year's rent to be paid and payable in advance, and the same to be recoverable in the same manner as rent and arrears are recoverable in other cases between landlord and tenant. And it is also agreed that the said Samuel B. Stevenson shall not, without permission (in writing) from the said Earl of Leitrim, or his heirs or assigns, make any new roads, fences or drains on the said lands, or build or alter any house or building thereon, or use or allow to be used any house or building thereon as a dwelling-house, save that in which he shall himself reside, or that he will not grow two white or grain crops in succession on any part of the said lands, or that he will not in any one year have in tillage more than 20 acres, or dig, plough, or break up any of the permanent grass fields upon the said farm, at the time of his obtaining possession of said farm, or afterwards laid down by him (or that he will not in any one year till with a potato crop any greater quantity of land than that which shall be under other green crops, or till with a potato crop any land which shall have been in grass or hay during the previous year, or sell or carry off the said land any hay, straw, manure, turnips, or mangold worsel); and that he shall not assign, sublet, let in con-acre, or for a crop, or subdivide for grazing, or part with the possession of the said lands, or any part thereof. And it is also agreed that the said Samuel B. Stevenson shall keep during his tenancy, and at the termination of his tenancy shall leave and yield up in good and tenantable condition, all buildings,

fences, gates, and watercourses, which are now, or shall be hereafter, during the continuance of his tenancy, on the said lands, and shall dig up or cut down all thistles, docks, and other weeds, before they go to seed, or at any time then desired to do so by the said Earl of Leitrim, his heirs, or assigns, or his or their agent, or other person, duly authorized for the time being. And that the said Samuel B. Stevenson shall assist to the utmost of his power the said Earl of Leitrim, his heirs or assigns, in prosecuting trespassers, and permit or suffer the said Earl of Leitrim, his heirs or assigns, to make use of his name, in any proceeding, in prosecuting trespassers on said lands, and that the same shall be at the cost of the said Earl of Leitrim. And that the said Samuel B. Stevenson will not at any time take out, or suffer to be taken out, upon the said premises any dog, or dogs, or destroy or suffer to be destroyed, any game, or the eggs or young of any game, hares, or rabbits, or wild fowl, upon the said premises, but will preserve and protect the same. And it is also agreed that the said Samuel B. Stevenson shall not cut for fuel any part or portion of the soil or surface of said lands, or any bog, moor, or mountain, or any part thereof, without the permission, in writing, of the said Earl of Leitrim, or his heirs or assigns. And it is further agreed that, on the breach or non-performance of any of the aforesaid agreements and provisions entered into on the part of the said Samuel B. Stevenson, he, the said Samuel B. Stevenson, shall pay to the said Earl of Leitrim, his heirs, or assigns, the further yearly rent of £37 10s., the same to be recovered and recoverable in like manner as the rent hereby reserved, and to be deemed as liquidated damages between the parties, and not in the nature of a penalty, the said Earl of Leitrim to have the usual powers of distress and re-entry, as between landlord and tenant, in case of non-payment of rent. And if said Samuel B. Stevenson shall commit any act of bankruptcy, insolvency, or be imprisoned by any civil or criminal process for a term exceeding fourteen days, then his tenancy shall cease, and the said Earl of Leitrim, or his heirs, shall have power to enter into and upon and re-possess the said lands, in the same manner as if the tenancy had expired by a notice to quit duly served and possession duly demanded thereunder. And it is further agreed that nothing herein contained shall be deemed or taken to entitle the said Samuel B. Stevenson to any payment or compensation for any farm or other building for agriculture or otherwise, or for any fixture or improvement of any description whatsoever done or constructed in, to, or upon the premises held under this agreement, except and unless the building, erecting, doing or making of such work or improvement shall have been previously stipulated for and specified by some article or agreement in writing, signed by the said Earl of Leitrim

and the said Samuel B. Stevenson. And lastly, it is also agreed that the payment of rent, or the receipt of the same, shall not be taken or construed into a waiver of any of the clauses and agreements herein contained." This document was signed in the office of the agent, who sent the claimant a message by one of the bailiffs that he wanted him for that purpose. No draft of that agreement had been previously given to the claimant, nor did it appear that a copy of it was delivered to him before he affixed his signature thereto; and the claimant in his evidence stated that he would not have signed it except that he understood he was at the mercy of the Earl of Leitrim, and that, perhaps in the event of refusing to sign he would be obliged to give up possession of the lands and leave the place, which would have been very inconvenient. He also stated that he never saw the original document (or agreement) before he saw it in the office of the agent, and that he did not see a copy of it until a long time afterwards. The claimant remained in personal occupation of the premises until August, 1869, when he was removed to Belfast, and in 1870 he became anxious to dispose of his farm. In that year a person called John Hunter made him an offer for the purchase of the farm at £350, which offer was accepted subject to the acceptance of the purchaser by the landlord as his tenant. The purchaser, it appeared, was a substantial farmer, but the respondent declined to accept him as tenant, refusing to give the claimant permission to sell, but offering to accept a surrender of the lands. On 21st August, 1871, respondent served on the claimant a notice requiring him to give up possession of the farm on 1st May, 1872, but no proceedings in the form of an ejectment were taken upon that notice. The claimant afterwards lodged his claim with the Clerk of the Peace, to which claim the respondent served a notice of dispute. The case came on for hearing at last Sessions held at Lifford, but was adjourned on the motion of respondent's solicitor to the present Land Sessions. Evidence on the part of the claimant was produced to establish the fact that the tenant-right custom had prevailed on the estate during the life of the late Earl, father of the respondent, and counsel for the respondent admitted that such was the case. It was also proved that soon after the present Earl came into possession he had refused to recognize the tenant-right custom, and that said refusal on his part excited at the time great alarm amongst the tenantry on the estate, so that in January of the year 1858 a very large meeting was held in the town of Milford for the purpose of protesting against the non-recognition by Lord Leitrim of this custom. A large placard, calling on the tenantry to attend that meeting, was put in as evidence on the part of his Lordship. The claimant stated that he did not himself attend that meeting, but that every person in the locality

knew of it ; and he further stated, that although he had no personal knowledge of Lord Leitrim's refusal to recognize the custom, yet he had heard of his having done so. Since the removal of the claimant to Belfast to the year 1870, the farm was under the management of his son, and a caretaker was placed in the house. In 1869, part of the arable land was manured with potatoes, oats were afterwards sown in the same field, and it appeared that at present there is no crop in it. In his absence, some friend or neighbour of the claimant, ploughed down a field containing less than a Cunningham acre for oats, which field had previously been in grass. The pleasure grounds attached to the house were altered by the claimant, the garden being changed into tillage. The thatch roof of the dwelling-house had rotted, and in some places let in wet ; but the claimant deposed that the house, when he got it, was almost a ruin, that he put new timber in the roof, had roofed a barn and built a byre, and had drained about four acres, Cunningham measure, of the farm. He stated that the house was in a much better state now than when he got it, that the farm was also in much better condition now than when he purchased it from Mr. Hewetson, and he admitted that he had not made any improvements since the year 1867. Witnesses were produced to prove the existence of the tenant-right custom on the adjoining estates, and that the same custom also prevailed on the Leitrim estates previously to and up to the time the present Earl came into possession. On this state of facts Mr. Donnell, counsel on behalf of the claimant, insisted that, notwithstanding the refusal by the respondent to recognize the former usage of the estate, the holding in respect of which this claim was made was still subject to the custom, and that the document bearing date 24th September, 1867, and signed by the claimant, did not amount to a surrender of the tenant-right. On the other hand, Mr. Holmes, counsel for the respondent, urged that, previous to the passing of the Land Act, tenant-right was only a privilege, which was at any time revocable by the landlord, and that the respondent had actually done away with its existence, by refusing to recognize it before the passing of the Land Act, and, therefore, it could not now be in force. It was contended for the respondent that the agreement which the claimant signed was to be taken as abandoning his claim ; that the agreement binding him against making new roads, assigning, subletting, letting in con-acre or for a crop, or subdividing for grazing, or parting with the possession of said lands, or any part thereof, would act as an estoppel upon his claim for tenant-right. In reply to that argument, that the refusal of the Earl of Leitrim to recognize the custom extinguished the tenant-right hitherto existing, Mr. Donnell contended that the Land Act was retrospective in its operation,

and that the custom once established was endowed with a permanent vitality, which no act of the landlord can destroy. He further contended that the agreement was not inconsistent with the claim, and that the agreement signed by the claimant did not amount to the relinquishing of the tenant-right. Having thus stated the facts of the case, and the contention on both sides, on behalf of claimant and respondent, I have now to state the grounds on which I feel bound to hold that this claim on the part of the tenant should be allowed. In the decision of Mr. Justice Lawson in the case of *Friel v. the Earl of Leitrim*, heard before him at Spring Assizes in this county, it is declared that, where a holding is proved to be subject to the tenant-right when the claimant got into possession, that right cannot be destroyed by the mere refusal of the succeeding landlord to recognize its existence. It could not with any justice be contended that—the respondent here being the proprietor of an extensive estate, and the claimant being accepted as his tenant under the tenant-right custom—it would be competent for the respondent, by any subsequent refusal to recognize that custom, to take away the right which constituted the most important element of the tenancy. Now, the Act of Parliament which declares the usages hitherto known as the Ulster tenant-right custom to be legal has invested them with the character, force, and effect of an established custom—a custom analogous to the custom of “copyhold” in England, which is to be held to go with the land, and not with the tenure. Such a custom as that cannot, therefore, be encroached upon against the will or without the consent of the party claiming under it, and entitled to its benefit. It is contended here that the claimant, by the agreement of 1867, which contains a clause in respect of alienation or assignment, has relinquished his tenant-right, if any then existed, in respect of this holding. In the case of *Friel v. the Earl of Leitrim*, when it came before me at Letterkenny Sessions in October, 1871, there was offered in evidence a printed document, corresponding in all its clauses, and exactly similar to that under consideration, and in giving judgment in that case (which was afterwards affirmed on appeal), I expressed the opinion that the corresponding clauses in that instrument were not inconsistent with the claim put forward under the Ulster custom, and, notwithstanding the able argument put forward in this case on behalf of the respondent, I see no reason why I should recede from the opinion given in my former judgment. The words, “It is also agreed that the said Rev. Samuel B. Stevenson shall not, without the permission of the said Earl of Leitrim, his heirs or assigns, make new roads, assign, sublet, let in con-acre, or for a crop, or subdivide for grazing, or part with the possession of the said land, or any part thereof,” do not amount to an absolute prohibition of the tenant-right, for the claim to

tenant-right implies that it is necessary the consent of the landlord should be given for the sale of the lands to any particular purchaser, and the stipulation or agreement that that consent must be in writing, cannot be taken as nilling the custom or inconsistent therewith. If the respondent, at the time the claimant was summoned into his office to execute this agreement, or at any time previous thereto, had given to the claimant actual and express notice touching the fact that he did not then, and would not thereafter, allow the tenant-right custom on this particular holding, there would then, perhaps, have been much weight in the contention of the respondent as to the effect of this clause against alienation or assignment. But no such notice is proved to have been given previous to the date of the agreement. The fact proved by the respondent that in 1858 there was held in the town of Milford a large meeting of the tenantry to protest against Earl Leitrim's refusal to acknowledge tenant-right on his estate is, in my opinion, strong presumptive evidence against any general acquiescence on the part of the tenants, and it shows that they did everything then in their power to protest against it. On an inspection of the document (the agreement), which is signed by the claimant, and which, I think, must be presumed to have been printed by order of the agent of the estate, under his Lordship's direction, it appears it has been signed by the claimant only, and witnessed by a clerk in the office. Now, I am of opinion that this agreement, which is not signed by his Lordship, cannot be held as fatal to the tenant's claim. In the case of *Domville v. Black*, 14 Ir. Jur., N.S., 266, it was held by the Court of Queen's Bench that a landlord who had not signed an agreement, or proposal made by the tenant, was not entitled, on bringing ejectment against such tenant, to compel him to give security for costs. The agreement was in this form, and almost similar to that in the present case: "This memorandum of agreement made between — Domville, on the one part, and — Black, on the other part . . . whereby the latter agreed to take all that and those, the lands, tenements, &c., to hold as tenant from year to year"—the court in that case refused the motion, on the ground that the agreement, not having been signed by the landlord, was not a lease such as is required by the statute, and could not be made use of under that statute—23 and 24 Vic. Judge Hayes, in giving judgment on that motion, said the landlord was bound to show not only what was the interest that passed to the tenant, but that that had been affected by the production of a written instrument completed, so as unmistakably to regulate the tenancy. It cannot be done by showing that the proposal is made by the tenant to take the lands, and then endeavouring to make out an agreement without the landlord. In his judgment Judge Hayes referred to an early case reported in 1 *Law*

*Recorder*, page 343, where a similar motion, made under an Act of George IV., was refused by the Court of Exchequer. In this latter case there was a proposal in writing by the tenant, and accepted by the landlord, but never accepted in writing. The tenant was let into possession as tenant from year to year, notice to quit was served, and an ejectment brought, and Baron Pennefather held that the term "tenant" is not derived by the instrument, but by the fact of the payment of the rent. In another case it was held that in an ejectment for non-payment of rent (under statute 25th of Geo. II., chap. 13), the lease should be executed by the landlord, and that execution by the tenant alone was not sufficient. This case is strongly applicable in principle to the present case, and supplies strong argument—conclusive to my mind—that the respondent here, not having executed this instrument on which he relied, cannot avail himself of its provisions, if indeed it is available for any purpose, and in my opinion, under that agreement, claimant has not relinquished his tenant-right. On these grounds, and following, as I am bound to do, the judgment of Mr. Justice Lawson in the case of *Friel v. the Earl of Leitrim*, which came before his Lordship on appeal, I am of opinion that the claimant is entitled to his claim in respect of his holding, that holding being, in my opinion, proved subject to the tenant-right, under the first section of the Land Act. With respect to the value of this claim, as between landlord and tenant, there is, as usual in these cases, much conflict of testimony. The amount originally paid by the claimant for the goodwill of the farm to the former tenant, Mr. Hewetson, was £140. The amount offered to the claimant by Mr. Hunter was £350, being an increase of £210, and considerably higher than any sum stated to be the value by any of the witnesses brought forward in support of the claim. One of these, Mr. Allan, puts it down at £310, but would not go so high as £350. Another witness, Mr. Patterson, says he would have no hesitation in giving £300. The witnesses for the respondent value it at much less. Mr. Chapman, the surveyor on Earl Leitrim's property, values it at £180—and two other witnesses value the tenant-right at £198, being eleven years' purchase at the £18 rate of value. Taking the highest value on the part of the claimant (£350), and the highest on the part of the respondent (£198), I am of opinion that the mean value (£274) will not be far from the true value of the tenant-right, as between claimant and respondent. From this amount, I am of opinion that there should be made a reduction, in respect of exhaustion of the land, and want of proper manure last year; but taking into account that the claimant has drained a portion of the lands, I believe £20 would be a fair sum to deduct for deterioration, leaving £254 as the value of the tenant-right of the claimant. I accordingly award £254 as the amount to be paid to him.

M<sup>U</sup>LHATTON v. MONTGOMERY.\*

*Proof of the Ulster custom from the surrounding district admissible.*

*A tenant against whom an ejectment decree was obtained in March, 1870, against which he appealed, and who was allowed, in order to get his crops, to remain in possession until after the Act came into force, and who had been sued for use and occupation at the present Sessions is not "a tenant under the Act."*

The tenant claimed in this case under sec. 1.

Orr, barrister, called upon the Chairman to dismiss the claim on the grounds—1st, because this particular farm was not a holding within the meaning of the Act; and 2ndly, that it had not been proved to be subject to any custom. The claimant was told he would not be allowed to enter into possession after his uncle's death, but on his uncle's death, however, and notwithstanding this caution, he entered into possession. He was served with a notice to quit, and the tenancy expired in 1869, previous to the Land Bill becoming law. He asked the Chairman to hold that no tenancy existed. The claimant was a trespasser up to the time the ejectment was served. At most he could only be called a tenant for a year certain at the time of the passing of the Act; and the court had already had evidence that the tenant-right custom could not be claimed by a tenant holding for one year certain. Under these circumstances, he asked the Court to dismiss the claim without calling upon the respondent to produce evidence.

*R. Donnell (with him Mulholland), contra.* The Legislature did not define what was or was not tenant-right, but left it to be proved. That proof was given that the custom of sale was frequently permitted where the tenant, though in occupation, was legally a trespasser; and as this tenant was in possession, whether he was a trespasser or not, he had the right under the Act to sell his tenant-right, which, before the Act, he had by the custom.

The CHAIRMAN said:—The first section of the Act contemplated a holding in which there was a tenant, and in respect of which tenant-right must be proved. He entirely concurred with the observation made by Mr. Mulholland, that that proof might be general, and must depend

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\* Ballymena Land Sessions, 31st March, 1871; before J. Hastings Otway, Q.C., 5 IR. L. T. REP., p. 73.



in every case upon its particular circumstances. When the surrounding district was proved to be subject to the Ulster tenant-right, that might be no evidence of the particular estate being subject thereto ; but when there was proof to some extent of a tenant-right existing on a particular estate, and more extensive evidence given as to its prevailing in the adjoining district, then he thought that the evidence as to the particular estate being subject to the tenant-right became, by the evidence of the adjoining property, more strong than it would otherwise have been. In the present case there was evidence of the surrounding district being subject to the Ulster tenant-right—that was, the right of the tenant to sell to an incoming tenant, provided he has the consent of his landlord, which consent was very seldom refused. The consent, of course, must be, and should be, refused to an unworthy tenant ; to an insolvent tenant ; to a bad farmer, or a man in broken circumstances. In this case, there was evidence, as he stated, of a right existing in the surrounding district, some evidence that it existed upon the particular estate, and not only that, but there was evidence as to this particular holding. The latter might not be very much ; but when he took it in connexion with the evidence as to the estate, and also took into consideration the right existing in the surrounding district, he thought he could not agree with Mr. Orr's arguments—and he took that opportunity of saying that it was a most able argument—with regard to the fact that there was no proof of this holding being subject to tenant-right. He had no doubt, however, upon his mind that when this Act was passed on the 1st day of August, 1870, Mr. M'Ilhatton was not a tenant of the holding, but a trespasser.\* If he was right in that, he apprehended that the case was plain. He believed he was right—right upon the language of the 16th section. He had some little doubt with regard to whether or not the fact of an action having been brought at the present sessions against Mr. M'Ilhatton for use and occupation could put him in the position of a tenant. He had been told, when his uncle got it, that he would not be allowed to go into possession. An ejectment had been obtained against him to put him out of possession after the Spring of 1870. Against that ejectment he appealed, and the decree of the Judge below was affirmed, but he was allowed to stay in for one year in order that he might get the crops off the ground. He had no doubt that the claimant was not a tenant. But was he to be deemed a tenant because a person acting for Mr. Montgomery, the landlord, makes a mistake, and instead of suing for mesne rates, sues for rent ? Was he, in consequence, to determine that a tenancy existed ? He

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\* But see *Charlemont v. Devlin*, ante, p. 181.—Note by EDITOR.

thought not. The landlord had not, by any act of his own, constituted him a tenant. He was, on the whole, clearly of opinion that the case must be dismissed, and he dismissed it accordingly.

The case came before Judge O'Brien on appeal by the claimant at the following Assizes, and a compromise was then entered into.

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MURRAY and OTHERS v. M'KIMMEN.\*

*A tenant may proceed on a dual claim under the Ulster custom. Claimants who have not taken out administration must do so before the claim is heard. Limited administration under section 59 will not be granted except in the case of claims of small amount.*

The claim was a dual claim, under the Ulster custom, and in the alternative under sections 3 and 4 for £233.

LOFTUS H. BLAND, Q.C.—I have decided to allow the tenant to proceed on the dual claim. He may proceed first to prove under the custom, and if he fails in that, I will allow him to proceed under sections 3 and 4.

T. C. Dickie, for respondent, objected to the claim being heard, as no administration had been taken out.

R. Donnell, for claimant, argued that as the present claimants were the defendants named in the ejectment, and there described as the tenants, the respondent was estopped from making the objection. If any doubt arose as to who was entitled to the compensation, the Chairman could order the money to be deposited in Court; and, at all events, he could grant limited administration under section 59.

LOFTUS H. BLAND, Q.C.—The 59th section is only intended to meet cases where the tenant is too poor, or the claim is too small, to go to the expense of ordinary administration. This is not such a case. The claim is for £233. I will adjourn the case till next sessions, the claimant paying the costs of adjournment, and in the meantime administration to be taken out.

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\* Land Claim, Strabane Sessions, 11th April, 1871; 5 IR. L. T. REP., p. 116.

## M'GAUGHEY v. STEWART.\*

*The 15th section of the Land Act does not apply to the Ulster custom.*

*Town-parks are subject to the Ulster custom, which may be proved by evidence of the custom in the neighbourhood.*

The claim was for the benefit of the custom, and evidence was given that it existed in the case of town-parks. It was argued that the 15th section excluded the custom, as well as compensation for disturbance.

LOFTUS H. BLAND, Q.C., in giving judgment, said that although the occupiers of town-parks could not, by section 15, in the absence of custom, claim for disturbance, though they might claim for improvements, he considered that if a claim could be made under the Ulster tenant-right clauses of the Act, the fact of the holding being town-parks could not operate against it. The question then would be, Does the Ulster tenant-right, as a matter of fact, apply to this holding? He considered that in this case the custom had been proved, and he would therefore give a decree for the full and fair value of the tenant-right.

## FLECK v. LORD O'NEILL.†

*The 15th sec. does not apply to the Ulster custom. In case of a violation of tenant-right by the landlord, the court may decree specific performance of the custom, or order compensation to be paid by the landlord. The amount may be reduced under sec. 18.*

This was a claim for £300, the value of the tenant-right of four houses in the village of Broughshane, and 3½ acres of land in the neighbourhood, held as one holding by the claimant, who had purchased the interest of a previous tenant for £165, with the approval of the landlord, the arrears of rent having been deducted from the purchase-money. The claimant had been ejected at the January sessions.

\* Land Claim, Omagh Sessions, 21st June, 1871; 5 IR. L. T. REP. p. 146.

† Ballymena Land Sessions, 27th June and 10th July, 1871; Before J. Hastings Otway, Q.C.

Mr. Bulwer, sworn and examined—I am the agent for Lord O'Neill. The custom, as far as I know, since I came there, and before me, as far as I have ascertained, was that the tenants should be allowed to sell their tenant-right, Lord O'Neill or his agent approving of such tenant. The farms are always disposed of by private sale, subject to this condition, and not by public auction. A book is kept in the office in which the name of each person suggested by the outgoing tenants is registered with a view of making inquiries as to his character and solvency. No arrangement is made without the consent and approval of the landlord or me as his representative. When I went first to Broughshane I was struck with the disgraceful state of Fleck's tenement, and I suggested that he should either repair the place himself or Lord O'Neill would do so and put five per cent. increase on his rent. Some few months afterwards in passing the same place, I observed it in the same dilapidated condition. Previous to the visit I now refer to, Mr. Dickson had complained of the insufficiency of gate accommodation, and on personal examination, I found the request a reasonable one. I then told Fleck that I would pull down the gable to afford two inches more of a gateway, build up the walls afresh, and put on a proper slate roof ranging with the other house. It was about that time, but I do not know on what occasion, that I asked Mr. Dickson to buy Mr. Fleck's holding. He then came to me and implored my consideration, upon which I consented not to enforce the ejectment. It was then understood that I should do as I wished to put the place in repair. While the execution of the ejectment was being thus overheld, the bailiff reported to me that Fleck had sublet. I then resolved not to be further trifled with, and directed the execution of the ejectment. The cheque for £20 offered to him was not intended as compensation, but was simply a gratuity from Lord O'Neill to enable him to remove and support his family elsewhere. The lands were always considered in the office as town-parks, and were let as such.

Mr. W. Raphael deposed that he examined the land with a view to estimate its worth. A portion of the ground is very bad, and the rest has given two crops of oats. My estimate of the lands is £50, and £90 for the houses and tenements.

The CHAIRMAN, on a subsequent day, delivering judgment, said :—

I believe the lands of the claimant were town-parks within the meaning of the Statute ; that the houses in the town of Broughshane and the lands adjoining were subject to a certain usage ; that the claimant held two of such houses and lands behind them ; that he was evicted on notice to quit, and made no claim of tenant-right or otherwise till after his eviction. The questions, then, are—1st, what was that usage ?—which is a matter of fact ; 2ndly, did it, if proved, confer an Ulster tenant-right ? which is a mixed question of law and fact ; 3rdly, was it violated on the part of the landlord ?—which may be a question as much of law as of fact ; and, 4thly, if it was interfered with by the landlord, what redress is open to the claimant, and how and in what form should he seek it ?—these are pure questions of law. With regard to the first question—viz., what was the usage affecting this particular estate ?—I should say it was a liberty to the tenant to sell, subject to the landlord's approval of the person to whom the sale was to be made, and subject, also, to a condition that the tenant should not sublet without the landlord's consent. Such is my opinion on a matter of fact. As to the second question—viz., did the usage confer what is called an Ulster tenant-right ?—I think I should speak a little more at large, and I consider I do not otherwise than my duty, if I refer to the subject as it was before and since the Land Act. Before the Land Act, and of course, since, there was a general right allowed to the tenant in many, if not in all, counties in the Province of Ulster to sell, with the consent of his landlord, his interest in his tenancy, though it was one only from year to year. In any other place in the United Kingdom a tenant holding under the same tenure might sell, if he could get any one to buy, without the consent of the landlord. However, such sales are necessarily rare, if they occurred at all. But in Ulster a consent, more or less qualified, was generally given, and to sell with consent became a custom. On some estates, and even on some holdings, the assent of the landlord was subject to conditions. I am not prepared to say that on some estates there was not a custom to sell without any condition, even of the consent of the landlord ; but I never knew of one. However, the power to sell was, if I may adopt the term, the genus—the conditions or qualifications made the species of the custom. Was such a custom a legal one ? I have a hundred times refused to recognize it. It was not general and uniform ; it was not certain ; it was not immemorial ; it was opposed to the general or common law of the land ; and it had none of the requisites of such a custom as the law of England would allow any existence to. I don't want to parade learning on the subject of customs, but I would refer to the full and very learned judgment of Chief Justice Tindall, in the case of *Tyson v. Smith*, 9 A. & E. 420, in which he says—"A custom is well described to be a usage which obtains the force of law, and is, in truth,

the binding law within a particular district, or a particular place, of the persons or things which it concerns. It must be certain, reasonable in itself, commencing from time immemorial and continued without interruption." At a time when such was the case, as to the law of customs, as any lawyer would acknowledge, came the Land Act of 1870, declaring the Ulster custom or usages to be legal. On a former occasion, in a judgment delivered some weeks ago, I stated that the Statute did not make legal what was before illegal in the ordinary sense of the word—that is, punishable—but that it gave a certain legal status and conferred certain legal rights where before neither the status nor the rights existed. It supplemented what the Ulster custom wanted by our law. It gave it antiquity and reasonableness. It took away any objection for uncertainty or limited application, and the Ulster tenant-right custom is now, in all the elements of a legal custom, as well established as the custom of gavelkind, or borough English, or of those manors in which copyhold tenure prevails. I take it, therefore, that on any estate in Ulster where a customary right exists, no matter what the species may be of a more general custom, acted on and recognized more extensively, it has the character and incidents of a legal custom, the custom, its existence, its qualifications, and extent being a question of fact. But it must be a custom, not a practice or allowance of very recent origin or recognition, and it must be an Ulster custom. Upon the faith of that Ulster custom, millions of money have been expended, not merely in improvements, but in buying up the interests of outgoing tenants, and that with the express or implied consent of the landlord. To disregard such outlay, and disappoint and impoverish the tenant, who had so improved or bought, by a notice to quit, and then an ejection without adequate cause, was what I believe few landlords in Ireland, much less in Ulster, were really guilty of. If any have been guilty they should be made to pay for it; and the Land Act professes to make them do the right thing and the just. Now, according to its provisions, it has attempted to make them do so must be hereafter and presently considered. Before I proceed, I would suppose the existence of an Ulster custom on some particular estate and holding, and how and under what circumstances it might be violated. I take the case to be where the custom is to sell with consent of the lord; to sell without consent, I believe, rarely, if ever, exists. However, if it does, and its existence is capable of proof, it would present a simpler case, but the same considerations would apply to it. However, I will deal with an instance where the custom is to sell with consent. The tenant is either anxious to sell, and has made his bargain with a purchaser, or he is anxious to stay where he is and as he is, and has had no proposal to sell. In the former case, he goes to his landlord, and says he wants

to sell, and has got a purchaser, and asks his consent. The landlord refuses. The proposed purchaser is not a man who, either for character or solvency, he desires as a tenant. The custom requires the landlord's consent, and how is that consent to be forced? I am not prepared to say that, if the landlord (after several persons are proposed as purchasers) refuse, from whim or caprice to accept a suitable tenant, there could not be means found to prevent him from disappointing the custom. But take the other and latter case. A tenant has no desire to leave, but wants to hold on; and the landlord serves him with a notice to quit. That, I think, may be considered as a disturbance of the custom and the tenancy. The tenant looks out for, and gets, a purchaser; presents him to the landlord, and the landlord rejects him, and immediately the tenant serves notice of a claim. And the question will be considered by the Land Court, whether the landlord was right under all the circumstances, and it may give a decree declaring him to be wrong, and ordering him to admit the new tenant should he not be fairly objectionable. If, before the decision, he has completed the eviction and let to another he cannot complain. He, and the person he has favoured, dealt with the subject-matter *pendente lite*. But, take another case, which was this case. The tenant does not want to sell, proposes no new tenant in his place, and the landlord for what he thinks sufficient reason, serves him with a notice to quit, and ejects him; and then the tenant who has made no claim under the custom hitherto, puts in a claim under the recent Land Act, and says you have prevented me from selling—which he never proposed to do. Is the landlord a violator of the custom? The custom was to allow the tenant to sell, if he proposed a tenant to whom the landlord could not reasonably object, and the tenant, with full notice and opportunity, does not appeal to the custom or propose a tenant, but allows the decree to be executed without even serving a claim. How, then, was the custom broken? But, furthermore, suppose the judgment in ejectment to be executed, and the former tenant put out, and that the landlord lets in another tenant, no claim having been served till after the new letting. What under such a state of facts, should be the remedy, even assuming the custom to be violated? Should the Court decree as it were for specific performance of the custom, and put out the new tenant, who took *bond fide* for valuable consideration, and without notice of any claim, asserting a right to possession. I should say not, and that the contention, if any could be sustained, would be between the landlord and the tenant, and that for compensation to the latter for the violation by the former of a legal right, should such be proved to exist. However, the chief and first question is, can a contention be sustained on the part of the tenant, that the custom under the circumstances I have assumed

was violated by the landlord? I have had considerable difficulty about it, but, on the whole, I think that of the essence and spirit of the custom there was a violation, and that where a tenant has believed in, and lived and farmed on the faith of, a custom, which the landlord also knew, and subject to which he enjoyed his estate, I think it would be hard to turn the tenant round upon the point of his not serving a notice in time, or presenting a purchaser within a certain period in his stead; and that, if the landlord enjoys the land himself, or the benefits of the new tenant who cannot be immediately disturbed, he should compensate the old tenant for the interest which, considering the custom, he has lost. But, to come to the fourth question I have proposed, can such compensation be recovered under the Land Act? It has been argued that it cannot; that I can only decree in favour of the tenant-right generally, and of any claimant under it in particular—order that it be recognized, and enforce my decree by attachment. I don't concur in that argument, and I think I can, in a fitting case, decree for compensation and for these reasons:—the Statute is divided into parts, and the first part is headed "Law of compensation to tenants"—"claims to compensation;" and then comes the first section declaring the Ulster usages to be legal; and in sections 3 and 4 and 7 a tenant is spoken of and legislated for who does not claim compensation under sections 1 and 2; and further under the judges' rules a form is adopted for tenants who claiming under the custom are spoken of as claiming compensation in respect of it. Therefore, from what I have stated, it would appear to be the intention of the Legislature, gathered from the words of the Statute, that *compensation* may be, under circumstances, the proper redress for violation of tenant-right. The 16th section, which speaks of claims in respect of any right, or for payment due by way of compensation, would seem to show that compensation was not the only redress the Statute contemplated. Being, therefore, of opinion that where there has been a violation of the Ulster tenant-right there can be not only a decree establishing and enforcing it, but a decree under circumstances for compensation; the next question which occurs as bearing on this particular case is, whether in the case of houses, in a town and lands adjoining, which I consider to be "town-parks," compensation can be recovered. The 15th section says "no compensation shall be payable under the preceding sections of the Act in respect of any holding ordinarily termed town-parks." The contention for the respondent, syllogistically put, would run thus:—Whenever compensation is payable under the provisions of the Act, town-parks are not liable: compensation is payable under the Ulster custom, by the provisions of the Act: therefore town-parks are not liable. The conclusion would be irresistible, if both the premises were undeniable, but I think there is weakness in the



second or minor premise. Is compensation payable in respect of the Ulster custom under the Act? It is there the difficulty lies. I have assumed it may be payable under the Act, but it is so by inference or reasoning. It is not in terms distinctly made payable under the Act, while other compensations referable to other circumstances and facts are. Tenant-right or custom might be enforced specifically. It might also be asserted and made beneficial by a decree for compensation, as an incident of or corollary from the custom which the Statute legalized. But there are compensations, as I have said, specifically mentioned, and for the first time made payable under the Statute, and it is to these, I think, though not free from much doubt, the 15th section refers. I would more especially instance compensation in cases of disturbance as to which the Act in the third section begins to deal, creating new and abnormal rights—unknown to the common law or any recognized custom, or even to any practice, however recently originated. It might be said that according to this view the Ulster tenant-right is legalized by the first section, and that with such direct or incidental rights as the section establishes the remainder of the Statute does not at all interfere. I am not prepared to say that. I hardly think that any ingenuity can prove that the Statute affects the Ulster custom in holdings which are neither agricultural or pastoral. To the Act alone is due the merit of legalizing the Ulster custom, and the seventy-first section expressly declares that it shall not extend to any holdings except those of an agricultural or pastoral character. The tenth section, as to which a similar question might be also raised, points to what is to be considered a disturbance by the landlord, and I think such disturbance has reference to the third section, which first speaks of disturbance; and although there may be a disturbance, or, more correctly speaking, a violation of tenant-right, I do not think that in necessary construction, or even in intention fairly inferred, an interference with the custom was contemplated when disturbance is spoken of. From what I have said, if my opinion be correct, town-parks, if subject to the Ulster tenant-right before the passing of the Act, are not, by the exceptions of the fifteenth section, withdrawn from its operation; and as to such, the old custom is legalized and continues. The remaining questions have regard to the facts and equitable considerations. In dealing with these, I have no doubt I may act upon the eighteenth section, if necessary, in order to do what I consider to be substantial justice between the parties. The claimant paid £165 to an outgoing tenant in the year '58, and he did so with the consent of the landlord. That is a most important fact to bear in mind, although the respondent's agent, Mr. Bulwer, was not aware of the fact, as he stated, and I have no doubt truly, when he brought the ejectment. There is a section of the Act of Parliament

under which the claimant might have claimed in respect of that payment of £165—section 7—if he had not put his case on the Ulster custom, under the first section of the Act. Having paid the money, he went into possession. As a juror, I believe he neglected the holding, which consisted of two subject-matters. One was a house or houses in the town, not agricultural or pastoral, as to which the custom was not legalized. Another was town-parks, as to which it, if I am right, was legalized, and as to which compensation could be given. What was the chief subject of demise which gave a character to the other? I incline to think the land brought with it the houses, although the houses were not on the land demised, though I by no means am free from doubt. However, as I said, the holding was neglected. Part of the houses were allowed to become ruinous—a disgrace to the town and property in or on which they stood. The claimant was called on to repair, and if he had no means to do so the landlord offered him the means, at reasonable interest. To this he would not accede, and not only so, but refused to give up a very small portion of the premises he had allowed to go into ruin, for a necessary and important improvement. However this was not all, he sublet, the custom of the estate being—a matter of fact which I believe—against subletting. He was remonstrated with, to no purpose, and then a process of ejectment, because of his subletting, was brought against him. He went to the agent, sued for forgiveness, and promised not to sublet, if the ejectment was withdrawn. He also consented that the premises, which he had allowed to become so unsightly, should be repaired and altered. While those remonstrances and promises were going on he was invited to sell his interest and get a new tenant in his place, and this on more occasions than one. So it was sworn by the bailiff, and though contradicted by the claimant, I believe it. However, he would not, or at least did not, but went on subletting, and for such subsequent subletting a process of ejectment was, for the second time, brought, and he was evicted. That eviction was effected in the month of March, in cold wild weather, and it was said that he was driven away from his dwelling roofless and homeless depending on charity for shelter. I believe that picture was much over-coloured. Still, I cannot but think it reprehensible, that the eviction took place at the time and under the circumstances it did. However, it was sworn, and I believe, that it was the act of the officer who thought it his duty to execute the decree, and that with the time and mode of execution the landlord or his agent had nothing to say; and, furthermore, that when it was known that the claimant was put out, arrangements were initiated to provide him a dwelling, and that as a gratuity—but gratuity only—he was offered £20. This the claimant refused, and determined to take advice as to his rights under the recent Land Act. I have no

doubt that the custom of the estate, at least in recent years, was to prohibit subletting without consent, and that whenever it occurred and was detected it was punished. Although many instances of subletting were shown even as to this particular holding, it did not appear that they were without consent and recognized. Mr. Orr in his very able argument, while he admitted the existence of a custom on the estate to sell with the consent of the landlord, contended that as there was also proved a custom not to sublet, which the tenants knew and recognized, that the two customs were coincident and dependent, and that a tenant who violated one could not insist on his rights under the other. However ingenious and striking the argument was, I do not agree with it. It was not proved to me to be the custom that subletting should operate as a forfeiture of the right, although it was prohibited, and I do not feel myself bound to say that such a subletting destroys a custom probably much older and better established—viz., to sell under a well-defined tenant-right. And I adopt, as applicable to such a case, a principle recognized as to copyhold tenure, given in the case of *Baspool v. Long*, Cro. Eliz. 879, and mentioned in a part of Mr. Butt's forthcoming book, "that all customs going to the making of the estate were to be taken favourably; all customs in depreciation or in bar of it are to be construed strictly." In conclusion, the result I have arrived at is that a tenant-right existed as to the land, although it consisted of town-parks, and although held with houses which were exempt from it, so far as the operation of the Act goes; that I can award compensation against the landlord for his interference with it; that there has been default and unreasonable conduct on the part of the tenant by subletting; by allowing part of the holding to become ruinous; by rejecting fair offers by his landlord; by refusing, or, at least, neglecting, to sell his tenant-right when requested, and, if I believe the witness (Kirk), when "coaxed" to do so, which, if he claimed under the 7th section, might disentitle him to get the money—£165—which he paid in 1858 on coming into the holding. For these reasons, I think I am justified in reducing the compensation he would be otherwise entitled to—he claimed £260—and fixing the sum for which I will give a decree at £100.

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WILLIAMSON and OTHERS v. EARL OF ANTRIM.\*

*The 15th sec. does not apply to tenant-right claims.*

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\* Ballymena Land Sessions, July, 1872; before J. H. Otway, Q.C.

*The custom is extinguished when a tenant's holding comes into the landlord's hands.*

The claim was as follows:—The claimants say that the said lands are held by them, subject to a usage prevailing in the province of Ulster, and known as the tenant-right custom, whereby the tenant is entitled to sell his interest, commonly known as the tenant-right in his holding, by public auction or private contract, subject to the rent at which it is held, or such altered rent as shall not encroach upon the said interest, at the best rate, to a solvent and respectable tenant, or in case the landlord desires to resume possession of the said holding, or unreasonably objects to the purchaser of the said tenant-right, is entitled to the value of such tenant-right as if sold as aforesaid, and the said claimants say that, in accordance with the said custom, a sale by auction of the tenant-right of the said lands took place on the 9th January last, and Andrew Todd, a solvent and respectable tenant, was declared purchaser thereof, and the said respondent, contrary to, and in violation of the said custom, by his agent, on the said 9th day of January, gave notice that he would not acknowledge the sale of the said tenant-right of the said lands, nor accept the purchaser thereof; and did further refuse to accept the said Andrew Todd as tenant; and has, moreover, since given notice that he must insist on having possession of said lands given up to himself; and, therefore, the said claimants claim the order of the Court that the said lands are subject to the aforesaid custom, and that the respondent do accept the said Andrew Todd as tenant thereof; or that the said interest or tenant-right in the said lands be sold in accordance with the aforesaid custom; or that the said respondent pay to the said claimants the sum of £75, being the value of said interest or tenant-right.

The respondent disputed the claim and every part thereof. There was a similar claim in respect of another holding of the claimants.

It was admitted that the lands were town-parks, and that, up to six years ago, there had been an unlimited right of sale—in the words of a witness, the town-parks of Ballymoney were as freely transferred as bank-notes. Sometimes the sale was by public auction, sometimes by private contract; and it did not appear that in any case up to six years ago, the purchaser had been refused by the agent.

Mr. M'Donald, the present agent, stated that he had endeavoured to limit the amount receivable by an outgoing tenant to the amount he had paid when incoming. In addition, he allowed for improvements. Two instances were, however, proved where no limit had been imposed.

It appeared that in the year 1852 the holding was surrendered by the then tenant, M'Intyre, to the landlord, who kept it in his own hands, and let it for grazing for two years, when he let it from year to year to the grandfather of the claimant, and the claimant took by descent from his grandfather.

*Orr*, for respondent, argued that the surrender was an acquisition of the tenant-right, and thenceforth the holding, which meant the lands, ceased to be subject to the custom. Besides, by the 15th section, no compensation was payable in respect of town-parks under the preceding provisions of the Act. That included the compensation under section 1.

*Donnell*, for claimant.—The 15th section cannot control the first. The intention of the legislature was to legalize the custom in its entirety, so far as regards agricultural or pastoral holdings. The claim here was for a declaration of right under the custom—the right of sale. Compensation was only asked in the alternative. The claimant asked and preferred to get a declaration of right. The 16th section, and the form of claim under the custom in the rules, recognized this right. If the claimant was entitled to the benefit of a right, there was nothing in the 15th section to exclude such a claim. Besides, the compensation claimed was payable, not under the provisions of the Act, but under the custom. A surrender of the tenancy was not a purchase or acquisition of the custom. The language of the section, as of the Act generally, was popular, not technical.

The CHAIRMAN.—In this case it was admitted on both sides that the premises occupied by the claimant were town-parks. There was a contention as to whether a tenant-right, according to the Ulster custom, existed as to the town-parks about Ballymoney, which was a question of fact depending on evidence. And there was also a contention whether, under the Land Act, town-parks were exempted from the custom. That was a question which was considered and dealt with by me in a former judgment (*Fleck v. Lord O'Neill*, ante, p. 299). I see no reason to depart from anything I said in giving that judgment. I then stated

that I had doubts—these doubts are not entirely removed—still I adhere to my former opinion. The point must go, if judges on circuit will permit it, to the Court of Land Cases Reserved. As a juror, I believe that the Ulster custom existed with regard to the town-parks of Ballymoney. It was proved to me that for many years a right of free sale, either privately or by auction, was permitted and recognized as to those parks, and although since the year 1863 (when Mr. M'Donnell became agent), there have been in or about thirty instances in which such free sale was interfered with, and outgoing tenants were only allowed to recover what they actually gave, still I do not think that such restrictions were of the general kind, so generally proclaimed, and so generally accepted, as to destroy the right which previously existed. Assuming, then, that the right (that is the Ulster custom relied on) exists as to town-parks, and also as to town-parks in Ballymoney, it was contended by Mr. Orr, as counsel for the respondent, that, touching the holding in respect of which the claim was made, the custom (if it ever existed) was gone. The foundation of his argument was this, that before the claimant's father got the land it was taken up by Lord Antrim into his own possession, and by him let for grazing for a year and a-half; that by acquiring the land he, by unity of possession, acquired the right or custom incident to the land; and, therefore, having so acquired the land and the custom, it (the custom) was by the 1st section of the Land Act extinguished, and the landlord held, and might thenceforward deal with, the holding discharged of the custom. The Ulster tenant-right was incident to a tenancy from year to year. Its primary idea supposes a privilege to sell—a privilege to be exercised generally, if not always, with consent of the landlord. The custom gave that which, without the custom, could not exist, and in that power to sell its value lay. There could be no privilege to sell that which might, from its nature and extent, be sold without privilege. A legal right to sell a term of defined extent, with which a landlord could not interfere, and which gave the tenant a large and marketable interest, precluded the very principle on which the custom rested, and, therefore, wherever a lease conveying a fixed and defined tenure in point of duration was granted, the right by custom which appertained to an inferior interest, and one of nearly the lowest legal value, became, by the tenant's dealing with his landlord, submerged in the greater interest which he thought it prudent to take; and then the customary right which the tenant lost in his holding, the landlord in a certain sense “acquired.” Such would be my opinion on ordinary legal principles, and, I think, that such was the intention of the framers of the Act, not drawn from illegitimate sources—as debates in Parliament and such like, but from the whole tenor and analogy of

the Act itself. If, when the lease expires, the landlord chooses to deal with the tenant as if there had been no lease ; permits him when the old relation of a tenancy from year to year was again established, to sell for whatever he could get ; and allows him, by his conduct, to believe that the old custom had revived, I think the tenant may appeal to and rely on the custom as restored on his particular holding—evidence as to that holding being only applicable to it ; or, possibly, if it could be shown to be clearly the custom that the tenant, on getting a lease, got it with liberty to sell on its expiration, as if that lease had not been granted, such sale touching the particular holding ought to be recognized. If such would, as I consider, be the case where a lease had been granted—and I have dealt with the subject because it has arisen before me in other cases—I think it would be a portion of the same where the landlord had acquired a particular parcel of land to which a custom was incident, and by unity of possession acquired the custom. If he re-lets it on a tenancy from year to year, and afterwards allows the tenant to sell as best he can, and as if the custom still existed, I believe in that case he is both morally and legally estopped from denying the custom. Now, in the case before me for decision, the landlord took the land into his own possession—whether by purchase or surrender it did not signify. If from that unity of possession he acquired the custom, then by the first section of the Land Act, “Wherever a landlord has purchased or acquired from the tenant the Ulster tenant-right to which his holding was subject, such holding shall thenceforth cease to be subject to the custom.” That is a plain and simple enactment enough. The question then is, did the landlord, by repossessing the land, acquire the custom ; if he did, *cadit questio*. In my opinion, according to the principles I have laid down, and from the fact that the custom or right was incident to the holding, and that such right was exceptional and antagonistic to the landlord's ordinary common law rights, I take it to be plain that when he (the landlord) got possession of the lands as to which such rights (exceptional to his own) existed, that then, by such unity of possession, the exceptional rights were acquired by him and lost in the general ownership (Butt's *Treatise*, paragraphs 577-579A, page 477). The instances which present themselves to a lawyer's mind when unity of possession is relied on are generally those in which a right of way once existed over a certain land to other land, and afterwards both lands came into the hands of him who owned the dominant tenement, there the right has ceased, although under circumstances and certain conditions of tenure as to both lands the right might be revived. It would not be revived if there were a seizin in fee of both. (See *Thompson v. Thompson*, Bos. and Pul., 375 ; *Thomas v. Thomas*, 2 C. M. and R., 40, and

note). But in the case where a right exists in an occupier as against an owner in respect of certain land, and the occupation of that very land afterwards becomes duly vested in the owners, the right is merged in the ownership, more especially if it be an ownership in fee. I have said that if the landlord, after getting possession of land to which a custom was incident, reset it again from year to year, and allowed successive dealings with it as if the custom had never ceased; the tenant for the time being selling it with his (the landlord's) knowledge for whatever he (the tenant) could get, that, in such a case, the landlord might be assumed to consent to a revival of the former custom; but in this case no such facts existed—at least, they were not proved. After the landlord had, by acquiring the land, acquired (according to my view) the custom, and on the particular holding destroyed it, he let it to a man named Williamson, who occupied for some time, and on his death his son (the claimant) went into possession. He said he advanced his father some money before he died, but of that there was no proof, and even if he did, it did not at all appear that the landlord was in any way aware of it; but if the money was *bonâ fide* paid for the occupation of the land on the father's decease, and that the landlord was aware of it, and made no objection, I hardly think that such one dealing would enable the son to claim under the custom, as revived, but it might possibly afford ground for a contention that he was entitled, under the 7th section of the Act, for money paid by an incoming tenant. In sustinment of the opinion I have expressed, I would refer to certain analogies. The tenure by copyhold is one well known in England. It is a customary tenure, and affords principles of great value in dealing with this new law as to Ulster tenant-right. It would be pretentious and unnecessary for me to go into the general bearing of copyholds—their origin, character, and distinctive features. I think it enough for me to state that they exist by custom, that the custom varies in different manors, that they may be held for estates of freehold or for years, but always according to the custom of the manor and the will of the lord; that if the lord got the lands of a customary tenant by escheat or surrender, he might regrant or re-devise them according to the custom, although he had held them for a long time in his own hands; that if he granted them to be enjoyed, not according to the custom, but according to the course of the common or ordinary law, the custom was gone; and that, if the customary or copyhold tenant was in possession as such, he took from the lord a lease for years, the custom was gone. (See Co. Litt. 58 b, French's case, 4 Co. 31 a; Com. Dig. "Copyhold," B. 3 & L.; *Hargrave v. Brittin*, Co. Litt. by Thomas, Vol. i., p. 602, note M). Upon such analogies, and on first principles, I would say, even independently



of the last clause of the 1st section of the Land Act, that where the landlord got into his own possession lands as to which the Ulster custom formerly existed, and did not, by subsequent dealing, clearly proved, expressly or impliedly re-establish the custom, that what is known as the Ulster tenant-right did not exist as to that particular holding at the passing of the Act. On these grounds I dismiss the claim with costs.

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WILLIAMSON v. PAKENHAM.\*

*Unreasonable conduct in the 18th section of the Act means unreasonable conduct in the relation of landlord and tenant. Therefore, in awarding compensation the Court should not take into account collateral circumstances, e.g., alleged equitable claims between parties claiming the tenant's interest.*

Weir, for the respondent, said—Under the 18th section, the Court had full power to consider the unreasonable conduct of the parties to the dispute. That section applied to claims based on the tenant-right custom, as well as for disturbance and improvements. This case came before the Court, not in the light of an arbitrary eviction on the part of the landlord; but it was the act of a man using the legal powers placed in his hands of effecting an equitable family arrangement—and one that had the concurrence of a judge and jury.

Kisbey, for claimants, argued that the unreasonable conduct in the 18th sec. had reference to the relation of landlord and tenant, not to unreasonable conduct outside this relation. The conduct of the claimants in reference to family disputes did not enter into the case. If there was any unreasonable conduct, it was on the part of the landlord, who was substituting his jurisdiction for that of the constituted courts. The 18th sec. did not apply to the Ulster tenant-right, and the landlord's dispute was also inapplicable.

J. HASTINGS OTWAY, Q.C.—It appears that some twenty years ago a man named John Williamson had a farm of land adjoining a man named Birkmyre, and the common lease of both having expired, Williamson became the purchaser of Birkmyre's interest, which would afford some evidence of the custom, not only on the estate, but in relation

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\* Belfast Land Sessions, 14th April, 1871; 5 IR. L. T. REP., p. 118.

to this particular holding. Williamson managed the farm up to his death at the age of eighty-two. He made a will, the validity of which was disputed, and on looking at that document, there seemed *prima facie* evidence of, if I might use the term, unfairness, probably unfairness proceeding from undue influence. That was the question raised before the Judge of the Court of Probate, who sent it down to be tried by a jury of this county, the issue being whether the will was the last will and testament of John Williamson. The jury found that it was, thereby negating any supposition of undue influence, at least as far as the validity of the document was concerned. Many remarks were made at the trial with which I have nothing to do. The Judge spoke strongly, and the jury certified strongly; and on a motion for a new trial, the Judge said that if £200 was paid to one brother, and a family arrangement made, he would not send the case again for trial. The Judge and jury thought John Williamson had suffered an injustice, and if they thought so, it was not unnatural that Mr. Pakenham should think the same. Believing that John was not fairly treated, he endeavoured to set him right as far as he could; but in doing so, he did what I think he should not have done; as, by the verdict of the jury, establishing the validity of the will, these two men were owners of the farm, and had a vested interest in the tenancy. He had acted, no doubt, from sympathy for John. This is not a case, as Mr. Weir has said, of a rapacious landlord putting out a tenant; neither is it a case of a heartless landlord wanting to get the land into his own hands. But it is the case of a man doing what he thought was right towards a particular tenant, and favouring him at the expense of another. In that, in my humble judgment, Mr. Pakenham was doing wrong, the jury having determined the validity of the will. The question I have now to decide is what was the tenant-right on the estate as well as on this particular holding, and what amount I should award the tenant for refusing to let him sell. I am disposed—because in all such cases I have contradictory swearing—to make as fair an average as I can, and I value the tenant-right at a sum intermediate between that sworn to by the witnesses for the claimant and those for the respondent.

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ROSE THOMPSON *v.* ARCHIBALD HAMILTON.\*

*A landlord serving a notice to quit, for the purpose of enforcing payment of an increased rent, must pay the tenant the value of the*

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\* Ballymena April Sessions, 1872; before J. H. Otway, Q.C.

*tenant-right interest, calculated at a fair customary rent, where the increased rent demanded is unreasonable.*

*Quære.—If the rent demanded is a fair rent, should the claim be dismissed, a notice to quit having been served, and steps taken to resume possession.*

The claim was for the benefit of the tenant-right custom, the landlord having served notice to quit. The respondent admitted the existence of the tenant-right, but alleged that he was now entitled, under the custom, to an increase of rent. The present rent was £32 10s.; and the rent proposed as fair, under the custom, was £42 3s. At this latter rent, the landlord was willing that the tenant should continue in occupation, or sell to a solvent tenant.

The notice of dispute, disputed that "the present rent was fair and equitable; and alleged that a rent of £42 3s. would be a fair and equitable rent; and that according to the custom, the future rent should be fixed at that sum; and that at such rent, he was willing to allow the tenant to sell to a purchaser to whom no reasonable objection could be made."

*Caruth*, for claimant, stated that the respondent had, two years ago, purchased the fee-simple of this and another farm, for which a claim was pending at the present sessions. Rose Thompson, the claimant, was a widow, aged eighty-six years, and she and her ancestors had been in the occupation of this holding for one hundred years. The land consisted of forty-two acres, and was mostly arable, but when the claimant's forefathers got it, only a very small portion of it was in that condition. There were eight acres of bog, of which the claimant was supposed to get the grazing, but the landlord had let the cutting of the turf, and the claimant got no benefit from it. A lease of the land had been granted at £10 a-year, and about twenty years ago that lease expired. A valuation was ordered by Mr. Charles George Stewart, the then agent, that valuation being made by Mr. Brooke and Mr. Hamil. Mr. Brooke's valuation of the farm was £26 6s. 11d., and Mr. Hamil's was £28 16s. The agent fixed the rent at £29, and from time to time the rent was raised by little and little, and the tenant was now paying £32 10s., which was the rent paid at the time of Mr. Hamilton's purchase. The holding was reclaimed by the tenant, and neither Mr. Hamilton nor any preceding landlord ever made any improvements on the farm.

The CHAIRMAN asked if the landlord was willing to give the tenant the benefit of the custom, and to let her sell to a solvent tenant, provided he got the higher rent.

*Caruth* replied that if the landlord got what he wanted, he would confiscate the tenant-right. He wanted to put £10 a year into his pocket, and if he got that the tenant-right would be quite valueless.

The CHAIRMAN asked if he found that £42 3s. would be a fair rent, what would be the result?

*Orr*, barrister, for the respondent—Then your worship would dismiss the case.

The CHAIRMAN—Suppose I should arrive at the conclusion that £32 10s. is too small a rent, and that £42 was too much, and that a certain amount between those sums was fair and reasonable, what would be the effect? The landlord says, "I will allow you to sell." Will he allow you to sell at the sum that I shall find as its value?

*Orr*—The respondent will either allow the tenant to sell, or remain on the land, at whatever rent your worship may think reasonable.

*Caruth* said that the claimant had no confidence that the same thing might not again occur, even within the next two years. The landlord was now in court, and all that was asked of him was, that he should give the value of the tenant-right, and he would get his land. The landlord took steps to put the tenant out, and the tenant wanted compensation for tenant-right.

Witnesses were called to prove the value of the land, all of whom thought that £42 3s. would be too high a rent for the claimant's farm, and some of the witnesses were of opinion that the tenant-right was value for £350.

*Donnell*, for respondent, contended that the custom was to raise the rent at a stated period. The present rent was a fair one for fifteen years ago, but in these fifteen years agricultural produce had increased in value, and prices generally had increased, owing to the depreciation in the value of gold. The general prosperity of the country had increased, apart from exertions and expenditure of labour or capital on the part of either landlord or tenant. Was the landlord to share in no part of that added prosperity? The landlord had no intention to claim the whole of the increased value, but only what was fair and reasonable under the custom. He had done what every tenant-right landlord in Ulster did under similar

circumstances. He had employed a competent surveyor to fairly value under the custom for a new rent. Mr. M'Cartney, who had been employed as valuator on the tenant-right estates of the Earl of Antrim, Sir E. M'Naughten, Captain Macartney, John Cramsie, Esq., and others, had said that £40 6s. would be the fair setting value. At the old rent, it was sworn that from £250 to £350 was the proper sum, and the amount must be reduced accordingly, if compensation is decreed.

J. Leslie Beers, Esq., J. P., Richard M. Douglas, Esq., of Dervock, land agent of Sir E. M'Naughten, Colonel Mageniz, and James E. Leslie, Esq., and other gentlemen, deposed to the practice, as landlords or agents, of the tenant-right custom on their estates, and proved that a fair increase of rent at an interval of 15 or 20 years, was in accordance with the custom. M'Cartney deposed that £40 6s. was a fair rent. There was a piece of cut out bog included in the new measurement, and it was the custom to impose a fair rent on this when valuing for a new rent. On cross-examination he swore that on the estates on which he had been employed as valuator, his principle of valuation was to allow the tenant a tenant-right interest of 10 years' rent. When a tenant cannot get 10 years' purchase, the rent is too high. That in the present case would be £360; and he thought £350 fair compensation under the custom.

The CHAIRMAN—The claim in this case arises out of a notice to quit served by the landlord, accompanying a demand for an increased rent. The claimant, who was a most interesting old woman, stated from her long recollection how her predecessors in the occupation of this holding, who had been there for 100 years, had reclaimed and built upon the land. The rent was at first £10; and it was raised by degrees, until in 1854 it was fixed at £32 10s. The present respondent, who is a recent purchaser in the Landed Estates' Court, demands a future rent of £42. The present case affords a strong illustration of the value of the Act. The tenant does not wish to leave her place. The rent paid, it cannot be said, is at a great under-value. In my opinion, judging solely from the evidence before me, the rent demanded is exorbitant and extortionate. Had the landlord been more reasonable, and proposed a reasonable rent, I believe I should have dismissed the claim. For the cut out bog which is proposed to be included in the future letting, I am of opinion the rent should be increased by £3. In a case of this sort, I think I am bound to consider what the fair rent should be to a solvent and proper tenant.

I have heard a good deal about the increase in the value of farm produce ; but, on the other hand, I am also convinced that there is a great increase in the price of labour, and in the other outgoings of a farm. I am not convinced by the evidence in this case, that it is easier to make money now by farming than it was some ten or fifteen years ago. Fixing, then, the rent at £35, and taking Mr. M'Cartney's estimate of 10 years' purchase, which wonderfully coincides with the evidence for the claimant, I feel that I am right in awarding the claimant the sum of £350, as the value of her tenant-right.

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GRAHAM v. EARL OF ERNE.\*

*The leasehold tenant-right may be proved by cases of sales of leasehold interests, where the landlord was consulted as to the eligibility of the incoming tenant ; or by showing that on a general valuation of the estate, the lands under lease were valued for the new rent which should be paid when the lease determined, or by proving sales on the expiration of leases, or that the tenants continued in occupation at fair customary rents.*

This was a claim under the custom at the expiration of a lease.

Several witnesses deposed to the tenant-right custom on Lord Erne's estate in the case of yearly tenancies, and deposed to sales under leases of the tenant's interest, without consent of the landlord.

The CHAIRMAN.—This evidence does not establish the claim. What has been proved is this—that there were sales while the lease was pending, but sales in relation to which neither the landlord nor his agent was consulted. This does not prove tenant-right on the expiration of the lease ; for a man who holds as a lessee can sell without the landlord being able to prevent him. But where there are cases like those we had on the Castle Archdall estate, of sales of interest held under lease, and those sales not perfected or carried out without consulting the landlord, and getting his assent to the incoming tenant, that would be evidence to show that on the expiration of the lease the incoming tenant would know he was to be dealt with in the same way, and that he would have the same benefit as those who enjoy tenant-right from year to year. Else, why was the landlord at all consulted ? The sale one of the witnesses made was when there was no lease, and

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\* Enniskillen Land Sessions, July, 1872 ; before P. J. Blake, Q.C.

in that case the landlord must be consulted ; but, in the other case, if the landlord is not consulted, there is nothing to show the transaction is anything more than the ordinary sale of a house held by lease. I want to get evidence of transactions where lands were held by lease, which were sold on consulting the landlord as to the acceptance of the new tenant. There is another kind of evidence that would go to show the acknowledgment by the landlord of tenant-right on the expiration of the lease. Suppose that ten years ago there was a re-valuation of Lord Erne's property, and that the leased lands were valued like the others—of course, I don't mean that the rents could just then be raised—but that would show that the landlord intended to continue the tenant in possession as a matter of course, and to raise his rent if the lease should happen to fall before the new valuation. It was necessary to establish the fact that the tenant remained in occupation after the expiration of a lease, at an increased rent. Tenant-right, whether in the case of a lease or a yearly tenancy, was a question of fact. He would read the words of Mr. Gladstone on the subject. He would not use it as an authority, but as a true exposition of the Act of Parliament. "Having viewed it as a custom, we propose to take it as it is, and to give it the authority of the law. It was to be examined into as a question of fact by the courts to be constituted under the Bill." The custom should be proved to him as a matter of fact, and he would adjourn the case until October, which would be as much an advantage to the landlord as the tenant. He hoped all parties would be prepared then to give the fullest information.

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#### CARRAHER v. MACGEOUGH.\*

*A reasonable increase in the rent is not inconsistent with the Ulster tenant-right. But when the landlord insists upon a higher increase than is reasonable, the tenant is entitled to compensation.*

*The right to an increase of rent under the custom depends on the intrinsic value of the land, irrespective of the value of improvements effected by the tenants.*

*Amount of compensation awarded to the tenant in respect of an unreasonable increase of rent.*

This was a claim brought by Bridget Carraher, under the Ulster

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\* Ballybot Land Sessions, 5th January, 1872, before Hans H. Hamilton, Q.C.,; 6 IR. L. T. REP., p. 1.

tenant-right custom, for £700 as compensation under the said custom, the landlord having indicated his intention to resume the holding on the tenant refusing to pay the increase of rent demanded.

*Butt*, Q.C., said, in *Mrs. Carraher's* case the increase sought to be put on would amount to twenty-five or thirty per cent. Until lately she had paid fifteen guineas per annum, whereas they now proposed to raise her rent to more than £20. Mr. White's valuation of her farm was £15 11s. He asked the Chairman to fix the rent at a fair sum.

The following evidence was given on the part of the claimant:—

John White examined by *Donnell*—I am a land valuator and assistant county surveyor. I took Mr. Macgeough's measurement for the land, and valued each field separately. I valued it at £15 11s. 8d.

Cross-examined by *Monroe*—I valued the land as it stood, irrespective of improvements. If let without any input, it would bring about 22s. or 23s. per acre.

Richard Armstrong gave evidence as follows:—I am aware that the tenants were always at liberty to sell their interest in the land to the best bidder. I never knew of any buyer being refused. I am aware that the tenant-right sold from £26 down to £15 per acre.

*Monroe* for respondent:—The total amount of increase in the townland of Skeriff amounted to only £6 or £7 altogether. As he understood tenant-right, it was that the tenant might sell it subject to such a fair rent and such reasonable conditions as the landlord might put on it. It had been the habit of landlords at different times to re-value their land, and put a fair amount on it. If his client only put on a reasonable rent, and if it were not accepted, it would disqualify the tenant from claiming any tenant-right whatever. It came to this, was the rent that Mr. Macgeough sought to put on the land a fair and reasonable rent?

The following evidence, among others, was given on behalf of the defendant:—

Alfred Goodlatt examined by *Monroe*—I am an agent for property in this and adjoining counties. I made a valuation of the lands of Bridget Carraher. I asked her son what improvements had been made, and I allowed for them in the valuation. I consider £20 16s. 10d. would be a fair rent for the holding. I base my



calculations on the tenant-right value, and the average rent of land in the neighbourhood.

To *Butt*—I took the Ulster tenant-right at £8 an acre. I fixed £8 as a fair average. Supposing the tenant-right would sell for £20, I would say 5s. would be a fair rent. If it would sell for £12, I would say 10s. I fix my estimate according to the usual price. If it had been different from the custom, I would have altered it.

Mr. Robert Watters, examined by *Monroe*—I have valued Skeriff. £20 11s. 4d. is a fair rent for that farm, allowing for bog.

' Cross-examined by *Butt*—I did not value the letting value of the farm. I only valued what the tenant should pay to the landlord. I allowed for tenants' improvements.

HANS H. HAMILTON, Q.C., in giving his decision, said that the farm in question consisted of sixteen Irish acres, and the rent of late had been £15 15s., with some addition for bog. Mr. Macgeough now wanted to raise the rent to £20 and some odds, the proposed increase being based upon a new valuation. This would be an increase of one-fourth, or twenty-five per cent. It was a peculiar feature of the case that neither the landlord nor the tenant wanted to dissolve their mutual relations, provided the one got increased rent, and the other had not to pay more than she considered reasonable. But the tenant thought that she was paying as much at present as she should. The issue to be decided was whether the demand of the landlord was reasonable. If it were so, he had committed no breach of tenant-right. His next consideration was, and it was an onerous duty that had devolved upon him, to say whether the compensation of the tenant was such as should be sanctioned by his award. If, on the one hand, the claim of the landlord for increased rent was reasonable, he should sanction it; if not he would give compensation to the tenant. It appeared from the evidence that the original rent had been higher than it was at present, then a reduction took place, and small rises at different times since. The additional demand for rent for bog had been submitted to by the tenant, and therefore was legal. There had been great differences in the evidence as to the value of the land, and the propriety of the claim for increased rent. Tenant-right had now become very valuable, and it was important to consider whether a fair case had been made out on which to establish a claim for an increase of rent. The right to an increase of rent depended on the intrinsic value of the land altogether, irrespective of the improvements which had been effected by the tenant. Looking into the evidence, there was reason to believe that the farm

in question consisted of mountainous land. One witness called it a "chilly soil," and the other said it was "light." Bog had been reclaimed, improved, and made arable, and all the improvements had been made by the tenant. Offices had been erected by the same party. He had no jurisdiction to inquire into that with respect to damages, but he had in connexion with the claim for increase of rent. He did not think that the tenant had been paying too low a rent. Sometimes she had been unable to pay it, and reduction became necessary. This led him to think that the intrinsic value of the land could not bear up against the pressure of adverse circumstances. Therefore, there was not reason to believe that the rent was too low at any time. With respect to the landlord, he was in the habit of giving notices to quit; but if he were still noticing and raising the rent, he would prevent all harmony, and ultimately destroy the tenant-right. It was not the usual, the normal relation between landlord and tenant, to give such notices regularly. If tenant-right was worth anything, it gave security and satisfaction to the tenant, while the landlord enjoyed punctual payment of rent, and this happy state of things should not lightly be disturbed. The passing of the Land Act might be considered the reason for making an attempt to fix the rent, instead of having it fluctuating, and that was the case here. He regretted that the dispute had not been amicably settled when an opportunity had been afforded for a settlement. After hearing, and carefully weighing the evidence, he had come to the conclusion that there was not sufficient ground for the demand of £20 8s. 10d. of rent. The farm consisted of sixteen Irish acres, and the question to be determined was—should it bear a rise of so much? This would be more than 4s. an acre. This would be too great an increase of rent. The land was not of a good natural description. The houses and offices had been kept up by the tenant, and if they were to be re-let, and compensation estimated, the landlord would get two-thirds, and the tenant one-third, which would be too large a proportion for the former. All the improvements had been attributed to the tenant. The raw material, if he might so speak, would not bear such proportions of improvement that the landlord would receive £20 and the tenant only £10. He felt bound, therefore, to award the tenant compensation. And what should he award for the infringement of tenant-right? He could not measure compensation exactly according to the prices given here, but he was disposed to give, not from any arbitrary disposition, but looking to all the circumstances of the farm, what was less than some prices, but still large and full compensation. His decision was that the tenant receive £12 an acre for 25 English acres, or £300 in all.

## MALLON v. EARL OF CHARLEMONT.\*

*A claim served in June, 1872, possession having been given in Jan., 1870, is too late, and is not within Rule 12, Part I. of the Act, which gives the Chairman discretion to enlarge the time.*

The claimant claimed the benefit of the Ulster tenant-right custom, and asked the sum of £300 as the fair value of his interest in the lands of Clontivey, possession of which had been resumed on notice to quit by the landlord. The Earl of Charlemont, the respondent, who was alleged, but not admitted, to be the landlord, disputed the claim, and every part thereof, and further said it ought not to be entertained by the Court. He further said that the said claim could not be maintained, inasmuch as the alleged tenancy terminated before the passing of the Land Act; and, also, that the lands were surrendered before the passing of the Land Act.

Mr. Cecil Moore (Omagh) appeared for the claimant, and Mr. Munroe, barrister-at-law, instructed by Mr. Davidson (Dungannon), appeared for the respondent.

*Moore*, for claimant, asked his Worship to say that the service made should be deemed good service. He had given notice to the respondent that such application would be made under the 12th rule. The Court had a discretionary power to order the service to be deemed good, though out of time, if there was a sufficient excuse. In January, 1870, the claimant had been removed from possession of the lands by ejectment decree, consequent on a notice to quit. Under the 5th rule notice of claim might be served up to the 1st January, 1871, though the time limited by the rules for service thereof might otherwise have expired, and he submitted that up to January, 1871, we had a right to serve our notice under that rule. Not having done so, it now remains for us to show the reason why; and under the 12th rule the Chairman has power to declare the service to be sufficient, or enlarge the time for service, if sufficient excuse were made. The claimant held this farm, and also another in the county Armagh. It was arranged between the landlord and the claimant that if the latter gave up possession of this farm he would get an equal quantity of land in the county Armagh,

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\* Dungannon Land Sessions, April, 1872; before Sir F. W. Brady, Bart., Q.C.

on the landlord's estate there. It afterwards became impossible for the landlord to supply the claimant with that quantity, and instead of giving him the seventeen acres, he gave him eight acres. The claimant had been applying for the land, and when he found that he could not get it he lodged the present claim on the 5th of June last.

*Monroe*, for respondent, said that, in point of fact, the claimant was disturbed by a notice to quit, served in April, 1869, and the premises were voluntarily surrendered six months before the passing of the Land Act. He apprehended it would take a strong case to establish that the claimant had a reasonable case for the claim. He never heard of such a claim. If it were allowed, parties would be claiming for disturbances ten years back. He would ask his Worship to put an end to such claims by saying that he would not allow the claim after a lapse of two years.

The CHAIRMAN said it would be going a great deal further than anything yet done under the Land Act if he were to allow notice of claim to be served two years after claimant had given up possession. There was no sufficient excuse proved under the rule. He dismissed the claim with costs.

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#### SCOTT v. KING.\*

*Mode of fixing fair rent under the Ulster custom at the expiration of a lease.*

This was a claim for the value of the tenant-right of a farm, one portion of which, 35 acres, 3 perches, had been held under a tenancy from year to year at a rent of £20; and the remaining 32 acres, 32 perches, under a lease granted in 1832 for one life or 21 years. The life dropped in January, 1872. The landlord proposed to raise the rent. In a letter addressed to the tenant he said—"I shall have the lands valued by Mr. Nolan, the most experienced valuator in the county, and I will set your present holdings to you at whatever he considers a fair rent, and this valuation I will insist on you paying, it being the usage of Lord Waterford's estate for

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\* Londonderry Land Sessions, 15th October, 1872; before J. C. Coffey, Q.C.

the landlord to re-value, on the expiration of old leases, and for the tenants to pay what is considered a fair rent.

"Should this proposal be unsatisfactory to you, and not in accordance with your views of justice and fair dealing, notwithstanding the expiration of your leases, you are at liberty to sell your farms to solvent tenants, to whom reasonable objection cannot be made by me, subject to such fair rent as I have above alluded to."

The tenant made no offer in reply; but having been served with notice to quit the lands held from year to year, and with an ejectment process in respect of the lands held by lease, he served his claim. The landlord in his notice of dispute repeated his former proposals.

*Donnell* for claimant, argued that the proposals were unreasonable, in leaving the settlement of the rent to a single valuator appointed by the landlord. Mr. Nolan's valuation, unless he acted *malâ fide*, would be binding upon the tenant, no matter how unreasonable and exorbitant.

The CHAIRMAN.—My interpretation of "a fair and reasonable rent," to be ascertained by the valuator, is that the landlord may select a valuator in the first instance, but that it is quite competent for the tenants to say, if they think they have grounds for so doing, that the valuation is excessive, extravagant, and unreasonable—to take means to show that it is so, and then there is a court to determine, on the evidence, whether they can make out their case or not. The custom is, as I have judicial knowledge of it, that the increase of rent shall be a reasonable rent, having regard to the circumstances of the country, the price of produce, and the various other contingencies which may enter into a consideration of the sort. On the other hand, it would be a violation of the Act of Parliament, and would defeat the purpose and object of the Legislature, if an arbitrary, excessive valuation were put upon it.

*Donnell*—Or if the landlord could, by appointing a single valuator, and binding the tenant beforehand to accept that valuation, leave him (the tenant) without the right of objection, that also would be a violation of the custom.

The CHAIRMAN—Quite so. Supposing a landlord bring down a valuator from Dublin, or from England, accustomed to value the price of land in England; suppose a man employs his own brother,

or his brother-in-law, or anybody else of the sort, and that the tenant would have to submit, I have not the slightest hesitation in saying that I must hear evidence from competent persons on the other side to ascertain whether the valuation is really a violation of the custom, or a reasonable valuation. I think few lawyers would object to that construction of the Act of Parliament.

*H. Holmes*, for respondent—Your Worship will see that, in all these documents we say “a fair and reasonable rent.”

The CHAIRMAN—That is not the rent which may be put upon it by his valuation; for if there be instructions, say underhand instructions, the tenant would have a right to come into court and say—“We have a right to have a valuation of our own, we will come into court and prove our reasons for it.” Where no custom exists there is nothing to prevent a landlord saying to a person paying a rent of say £2, “I shall raise your rent to £5.” There was nothing, notwithstanding the Ulster custom, at the expiration of the lease, to prevent a landlord putting in £3, £4, or £5 additional, for the purpose of getting rid of the tenant. The law gave that power to the landlord, and there was no protection for the tenant except the opinion of the country. And the result is that what was before a custom is now law; what before was public opinion is now an Act of Parliament. It has been said it is an unfair thing for the landlord to appoint his own valuator, that the result would be that the tenant must submit, no matter how unreasonable the valuation. That is not so. Under the Ulster custom the tenant would, to my mind, have a fair ground of objection to give his name, his sanction, or consent to it. But we must deal with human transactions as they arise, and I want to know how the valuation, on the expiration of the lease, is to be got at. Is it for the tenant to say, “I will name my own valuator, and you, the landlord, must submit?” That would subvert every relation which should exist, and be perfectly impracticable to work—it would be nothing more or less than confiscation. It would be putting into the hands of the tenant the option to pay what rent he might please, or to determine it between himself and his nominee. The other side of the picture is this—The landlord names his own valuator, and the valuator ascertains the rent. The tenant is not bound to submit if he think the rent exorbitant and unreasonable—if it is a rent which would work the confiscation of the tenant-right which has been made the law of the land. And he can go and say, “This is an exorbitant rent, considering the price of the produce the land is able to afford, the condition of the soil, &c.” The landlord has the alternative of saying, “I say it is not.” Then the Legislature has appointed a court to

determine whether it is such rent as would defeat the custom, or a fair and reasonable increase of rent. The tenant may come in and produce witnesses to show it is excessive and exorbitant. And in common fair play, the interests of justice, and according to a business-like way of conducting affairs, who is to set the machinery in motion if not the owner of the property? I grant a dismiss in this case, with costs, Mr. King remaining bound by his offer to allow the tenant to sell to a solvent person at a fair and reasonable rent, to be ascertained by a competent and respectable land valuator—the tenant to have two months' stay of the *habere*, in order to afford him an opportunity to sell.

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JOLLY v. ARCHDALL.\*

*Nature and definition of Tenant-right.*

The CHAIRMAN in giving judgment said :—What are the characteristics and meaning of tenant-right? It may be divided into three phases. The first is that the tenant shall remain in possession of his holding, whether he holds under a lease or otherwise, subject, on the fall of the lease, to a revision of the rent, and subject, in case there is no lease, to a periodical and reasonable revision of the rent. The tenant is to remain in possession in this way, and under these circumstances, and that is tenant-right. I believe this tenant-right originated in the peopling of this province at a certain period, and I believe that just as the landlord got his grant of the forfeited lands, taken from the former rebellious owner or chieftain for his disloyalty, so also did the imported tenants get their rights to remain on the lands, the rent being, at intervals of from 20 to 30 years, periodically revised. The next stage of tenant-right is this. Suppose the tenant not to be remaining in possession, but that he is parting with his interest in the property by transfer or assignment. The usage in that case was that the tenant should be at liberty to do so, but that the landlord, at the same time, should have the right of veto—the right to say, “I won't accept that man as my tenant,” and to continue to say that as long as there was any reasonable objection to the proposed new tenant's solvency, character, &c. That veto did not by any means amount to saying, “I won't let you sell at all.” This part of the tenant-right was simply that the tenant should have the liberty of substituting a man equally good with himself as the

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\* Enniskillen Land Sessions, June, 1872; before P. J. Blake, Q.C.

future occupier of the holding. In connexion with this we are to inquire what was the price to be paid to the tenant. The out-going tenant pocketed the price of his interest in the property, a sum which was differently regulated on various estates. In some cases the landlord fixed it; on other estates it was limited to a certain number of years' purchase, and on others the old tenant was freely allowed to sell by public auction. All these apparent differences don't alter the custom; they are not, to speak in the language of logicians, the essential attributes of it, but merely the accidents. Where these rules are permanently established on the estate, I would say they are absolutely binding; and I dismissed the claim of *Noble v. Sir Victor Brooke, Bart.*, because the former bought the farm contrary to the known fixed rules of the estate. Mr. Sankey, the agent, afterwards recouped the man to a great extent. I maintain these rules where they are fully established, and I look upon them as the characteristics of tenant-right on the particular estate. The next stage or phase of tenant-right is, suppose the old tenant is remaining in possession, or suppose he is not selling, but that the landlord is taking the holding to himself; if the landlord takes the land into his own hands, it is a question of law whether we have authority to make the landlord pay on coming into possession the full marketable price—whether we are not to restrain him by an injunction to let the tenant sell. There are men who entertain strong doubts as to whether we have authority to say to the landlord, "You must become the purchaser." There is something harsh and unjust, they say, in this, as it brings the landlord—a man who understands the fluctuation of prices, into competition with those who seem to be at present affected with what I may call a wild fury for land. My own impression is that in some counties there has been a considerable amount of indiscretion in the way the operation of this Land Act has been forced on by the land-owners themselves. I consider the present a rash time to commence ejectments, when the prices are so enormously high. It would be much better for landlords themselves to remain quiescent till the present mania for land has somewhat subsided.\*

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\* The claim in this case was one for tenant-right, the landlord ejecting the tenant on the expiration of his lease. The Chairman, though expressing grave doubts, gave a decree for tenant-right. An appeal was taken, and heard before Lawson, J., who dismissed the claim for tenant-right on the ground that the evidence did not satisfy him that tenant-right existed at the end of a lease. The learned Judge gave a decree for improvements under section 4.



## ADDENDA.



# DECISIONS

## OF

### COURT FOR LAND CASES RESERVED.

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#### CARR v. NUNN.\*

*The character of a holding with reference to the 71st section of the Land Act cannot be determined by any general rule, but depends upon the special circumstances of each case; and, in ascertaining it, the object with which the tenancy commenced, the quantity of land comprised in the holding, and the use to which it has been applied, are material.*

*A villa residence, with eight acres of land attached, only half an acre of which, at the time of claiming, was in tillage, and six acres forming a lawn, in pasture, held not to be within the Act.*

*Under a claim to register improvements the Court must inquire whether they are suitable to the holding.*

This was a claim by the tenant, a solicitor, to register improvements under sec. 6. It appeared that by lease, dated the 21st of August, 1845, Edward W. Nunn, the respondent, demised to the claimant "all that and those, the house, offices, land, and premises, together with the quay, landing-place, or manure-bank, at Camlin, containing, in the whole, 8 acres Irish plantation measure, to hold from the 29th day of September then last past, for the lives of three *cestui que vies* therein named, and after and from the death of the survivor, for the term of 31 years, at the yearly rent of £35." The premises are about a mile and a-half distant from New Ross. At the time of the execution of the lease part was in pasture, and part under potatoes; and the embankment, subsequently reclaimed, was covered at high tide. The house then contained four apartments, each 12 by 14. It was then a slated

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\* Court for Land Cases Reserved, 18th Dec., 1872; before the Lord Chancellor, the Master of the Rolls, the Vice-Chancellor, Deasy, B., Fitzgerald, J., Morris, J., Lawson, J., Barry, J., and Dowse, B.; *IR. L. T. REP.*, 26; *I. R.*, 1, Reg. & Land Act Ap., 89.

hunting lodge. There was stabling for five horses, part of a kennel for hounds, and two other houses, one of which might be used as a cow-house, and the other as a coach-house. Additional rooms were since built. The fences, which at the date of the lease existed on the lands, had been since levelled, and the land at present, except that occupied by the house and the manure-bank, consists of a garden (containing half an acre), a lawn, including the reclaimed land (containing about six acres) in pasture, and a field (containing about half an acre) in tillage. Part of the new offices since built are used for the accommodation of other farms of the claimant. It was proved for the respondent that £20 would be a proper rent if let for agricultural purposes. The questions reserved for the consideration of the Court were:—First, whether the claimant's holding was agricultural or pastoral, or partly agricultural and partly pastoral in its character, within the meaning of section 71 of the said statute; second, had the judge authority to inquire whether the improvements were suitable to the holding, or was the claimant entitled as of right to an order for leave to file in the Landed Estates' Court a schedule specifying all the improvements admitted to have been made by him on his holding?

The LORD CHANCELLOR :—This case has been very well argued; we have had every material consideration affecting it brought under our notice; and we do not feel it necessary to postpone the judgment of the Court. It would be extremely difficult to determine generally, and by any hard and fast rule, what is a holding, agricultural or pastoral, or partly agricultural and partly pastoral, within the contemplation of the Land Act. Every case must be determined very much as we shall endeavour to determine this case—upon its own special circumstances. Here the question arises, whether or not a particular holding, which consists of a house and some eight acres of land, is to be dealt with as agricultural or pastoral, or partly agricultural and partly pastoral, or as residential only? We do not mean to determine that eight acres might not constitute an agricultural or pastoral holding; or that, under certain circumstances, a much smaller piece of land, consisting of four, three, or even two acres, might not be properly considered as such. We have to regard the nature and extent of the property, the object with which the tenancy commenced, and the use which the claimant has made of the tenement, in order to determine the nature and character of the holding.

In this case, can we pronounce it to be agricultural? No one contends

that it can be dealt with as pastoral. To aid us in answering the question, we have, first, the evidence of Mr. Carr himself. He says that he took this place as a residence. He is a solicitor, and he has an office in New Ross, from which the holding is distant about a mile and a-half. He took it as a residence, and he describes what it originally was, and how it was used by him. Mr. Nuun had employed it as a hunting lodge, and so it was afterwards employed by the claimant. It is not asserted that, in taking the place, Mr. Carr took it with a view to agricultural pursuits, or for the purpose of making profit in the way of agriculture, or that he did make profit of it in any such way. He had his farm beside it, and for this and the use of other occupants in the neighbourhood, his kilns and boiling houses were erected and employed. In addition, we have the evidence of Mr. Ryan, which distinctly describes the holding as a villa residence. Further, the parol testimony is sustained by the terms of the lease, and still more persuasively by the terms of the claim. The terms of the lease do not absolutely resolve the question, but it is to be observed, that they make the house and the premises connected with it the primary subject of the demise, and that the land is only treated as an addition and adjunct. It is an accessory to the principal—the residence of the lessee.

But more than that, looking at the schedule to the claim presented—a remarkable and startling document—for the purpose of discovering what may be sought from the landlord hereafter if this registration takes place, we find that the amount demanded in respect of this tenement of eight acres and a house, which originally had only four rooms, is a sum of £1,379 0s. 4d. Supposing the holding to have been agricultural, it would be difficult to imagine that such a great expenditure could have legitimately taken place for agricultural purposes or with a view to them. And the schedule demonstrates that its purposes were essentially different. Take the details. [His Lordship read the schedule of alleged improvements.] In the face of that statement of the particulars of claim for improvements on the dwelling house, walls, gardens, &c., can we hesitate to say that this large expenditure was incurred, not to aggrandize an agricultural holding, but to make a villa residence more comfortable and more respectable? Or can we possibly say that the premises derived, or were meant to derive, advantage from that expenditure for agricultural purposes? The demand, in my view, seems enormous, but its very nature precludes us from making it a charge as for agricultural improvements.

I think it reasonable, as I have said, in deciding upon the character of a holding, to have regard to its extent and character, the object with which the tenancy commenced, and the use to which the land has been

applied ; and, in this case, I have no doubt that the claimant commenced his tenancy and made his outlay to secure for himself a convenient dwelling ; that he took the land, as attached to the house, only for that purpose ; and that but for the house he would never have dreamt either of accepting the lease or incurring the expenditure.

We cannot hold that the house was not taken by the claimant for the purpose of residence, or that he ever intended to employ the eight acres except as ancillary to that purpose, and for the beneficial or ornamental use of the house as such. And we are, therefore, of opinion that the Judge was right in intimating his dissent from the decision of the learned Chairman in favour of the claim.

In determining this, we have substantially decided the case against the claimant.

But there remains the second question which has been reserved to be argued—whether at the time when the claim to register is made, the suitability of the improvements should be shown and determined ? And, although, as I have said, our decision upon the first matter disposes of the whole case, so far as the claimant is concerned, it is not desirable, after an argument such as we have heard upon the second—a question of great and general importance—that the opinion of the Court upon that question should not be intimated to the public. Upon it, also, we concur with the learned Judge who reserved the case. That question is, whether it be the right and the duty of the Chairman, of the Judge who hears the appeal, and of this Court, upon which rests the ultimate responsibility of decision, to enter into a consideration of the suitability of the alleged improvements to the holding on which they have been made ? We entertain no doubt that it is. If we had not before us the interpretation clause, it might have been more plausibly argued, that works actually done upon the holding should be registered on the requisition of landlord or tenant, without regard to their nature or result ; and this has been Mr. Butt's contention. But it seems to me that even in the absence of that clause, and upon the plain construction of the 6th section of the statute, when the Court is asked to register "improvements," it must necessarily inquire whether real improvements—worthy to be so called—have been made, and that it is not sufficient to show that certain work has been done or certain expenditure incurred, without regard to its character and application. If the matter rested only on the 6th section, the Court could not fulfil its duty without making the inquiry, fully and carefully, and should it, in the result, appear that there is nothing presented in the schedule which could within the fair meaning of the section be deemed an "improvement," the claim to register ought to be refused. Otherwise, if foolish, or capricious, or

wholly unsuitable expenditure were made, it would be incumbent upon the Chairman or the appellate tribunal to register as improvements, works indeed actually done, but calculated, instead of improving, to injure or destroy the property sought to be unjustly charged with the value of them. That seems to me equally repugnant to common sense and to the fair construction of the 6th section. But when we come to consider the interpretation clause, if, without it, there could have been any reasonable doubt, that doubt vanishes altogether. [His Lordship read the interpretation clause.] Here is what the Legislature describes as an improvement, and that is no improvement which does not add to the letting value of the holding on which it is executed, and is not suitable to such holding. When a claim is made to register improvements, and the Court proceeds to inquire whether they should be registered or not, the first question should be, whether there have been such improvements as are specifically defined in this clause, and before a single item of the schedule can be registered it must determine whether that item points to an improvement such as it describes? In our opinion, the inquiry in such a case as this, whether the works executed were improvements such as the statute contemplates, is imperative upon the Court, and it cannot fulfil its duty if it neglects that investigation.

The result will be that the decision of the learned Chairman must be reversed, and the claim disallowed, with costs to be paid by the claimant.

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#### MICHAEL FRIEL v. EARL OF LEITRIM.\*

Held (WHITESIDE, C.J., and MORRIS, J., *diss.*)

*Sub-division will not disentitle a claimant to the benefits of the custom, where the usage is to require the person who came in by the sub-division to sell to the other occupier, and it is not proved that the landlord made such a requirement.*

The LORD CHANCELLOR delivered the judgment of the majority of the Court. The facts, so far as they affected the question reserved, were very succinctly stated by Mr. Justice Lawson:—

“1. The holding was proved to be subject to the Ulster tenant-right custom.

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\* Court for Land Cases Reserved; before the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the Vice-Chancellor, Deasy, B., Fitzgerald, J., Morris, J., Lawson, J., Barry, J., and Dowse, B.

"2. It was contended on behalf of the respondent that the claimant, by sub-dividing his holding, contrary to the rule prevailing on the estate, had disentitled himself to the benefit of the custom.

"3. George Friel, the father of the claimant, was originally the tenant of the holding; he died in 1865, leaving two sons, Michael, the claimant, and Daniel. After the death of George, Michael was recognized as the tenant, and the receipts were given in his name; but George Friel had, in his lifetime, made a division of the farm between Michael and Daniel, and Daniel continued to live upon the farm, and had a house upon it; but Lord Leitrim was not aware of this until the year 1871, and treated Michael as the sole tenant; he then brought an ejectment, and in December, 1871, evicted Daniel and Michael.

"4. It was proved on behalf of Lord Leitrim that it was the duty of the bailiff to report to the office any case of sub-division—that he did not report this case, and that Lord Leitrim or his agent did not know of it until 1871. It was proved that sub-division was contrary to the rules of the office, and that the usage was, when sub-division took place, to require the person who came in to sell his interest to the other occupier, and if the parties did not agree as to the price, a person was appointed by the office to settle the price to be paid to the person going out. In case the parties did not carry out the arrangement, so that the land should be left in the occupation of one tenant, they would be all evicted. It was not proved to be the usage to evict the parties without giving them the power of disposing of their interest to a single occupier.

"5. Under the above circumstances it was contended on behalf of the claimant that he had never sub-divided the land, and that in any case, according to the usage proved, he should have been allowed to sell and dispose of the interest in the farm. With the concurrence of Mr. Justice Keogh I reserved the case.

"The question for the consideration of the Court is, whether the claimant disentitled himself to claim the benefit of the custom to which the holding was subject, if not discharged from it by sub-dividing in violation of the usage."

In the first place, the judgment of this Court must be founded on the facts in the case stated, and nothing else. The question is whether the claimant forfeited his right by reason of the sub-division which took place. Now, *per se*, the sub-division did not, according to the judge's finding, entitle Lord Leitrim to resume possession. It was a step towards that result, but only a step; for the usage cast upon Lord Leitrim the duty of requiring the person who came in to sell his interest to the other occupier, so that the land should be left in the occupation of one tenant.



If Lord Leitrim had fulfilled this condition, and given the opportunity of selling to a single occupier, his authority to evict would have been complete, and the tenant would have been entitled to no compensation whatever. That seems to me the plain and inevitable conclusion from the facts stated by the judge, and the result must be affirmative of his judgment, and the reversal of the judgment of the Court below. It was suggested in the course of the argument that the case did not present sufficient proof of Lord Leitrim's neglect to make the requirement prescribed by the usage as the condition of eviction, and we were pressed on this ground to remit it to the Court below, that further inquiry might be made upon this point, but I do not think that we need any such assistance. The Court should take it that the judge has set forth all the facts material for the consideration of the case, and that assumption excludes the supposition that there was any proof of the essential requirement by Lord Leitrim. The duty of making that requirement was cast upon the respondent, and on him also lay the onus of showing affirmatively that such a requirement, in fact, was made. It did not rest on the plaintiff to prove the negative; and this being so, and his evidence on the point not being reported, manifestly because none was given, there is no need of further investigation, and this case of the respondent fails through his own default.

Again, we were pressed on the form of what were called the pleadings, and it was said that the claimant should fail because he relied on the general usage, without the qualifying conditions that were proved to have been attached to it. But it appeared to me that the claimant's case was properly stated. He claimed the entire benefit of the general usage, and if our decision be correct, he was entitled to claim it, for, as I have said, the omission of Lord Leitrim to fulfil the obligation laid upon him relegated the tenant to his general right, and on that right he was warranted to insist, unless the respondent could affirmatively and by way of answer meet his reliance on it by observing that it was nullified, under the actual circumstances, by the operation of the rules of the estate, which he has failed to do.

As to the amount of damages, much had been said, but whatever might be the equities, if there be any, between the brothers Friel, the claimant here was the accepted and recognized tenant of Lord Leitrim, and the only person by whom, under the Land Act, the compensation could have been claimed. I do not think, therefore, this contention is maintainable on Lord Leitrim's part; and I shall only add, without discussing the matter further, that as to damages no question has been reserved, and that it is not therefore open for even consideration on the case as stated; and I shall add for myself that I see no reason for

doubting that the learned judge, who had so much better opportunity of accurate judgment on the point than we possess, reached a perfectly right conclusion. The result will be that the dismissal of the learned chairman must be reversed, and a decree for £169 pronounced in favour of the claimant.

The LORD CHIEF JUSTICE :—The 16th and 17th sections of the Land Act, as well as the judge's rules, showed that a reasonable exactness was required in stating in the claim the usage relied upon. On the traverse of the right stated in the claim, if it were shown that the right claimed was subject to a condition not stated in the claim, he held the claim was not properly made. The claimant must be put to another and better prepared claim. The contract or usage relied upon should be properly stated. In *Metzner v. Bolton*, 9 Ex., 522, it was laid down that a defeasible contract could not be correctly described as an absolute contract. An absolute right to sell by public auction to the highest bidder was not the true statement of a usage subject to a qualification as to sub-division controlling the tenant's right to sell his interest. If the custom stated by the Lord Chancellor were general throughout Ulster, this objection might not be of consequence. Was there a general tenant-right custom in Ulster? And if so, where was it described? He (the Chief Justice) knew of no general custom. Then it was the usage and custom affecting the claimant's particular holding that must be claimed and ought to be proved. It seemed to him that the tenant claimed the benefit of a custom wholly different from what was proved. On the general question, he would consider that in the case of a tenant who became such with full knowledge of a rule on the estate against sub-division, and who, notwithstanding that, did advisedly sub-divide against that rule of the estate, it would be a pernicious decision to hold such tenant entitled to the benefit of the custom or usage he had broken through. He held that such a violation of the usage disentitled the claimant to compensation. In 1865 the father of the claimant made a division of the farm between the claimant Michael and his brother Daniel. This division was studiously concealed from Lord Leitrim, and he did not discover it until—as the claimant's counsel put it—after the Land Act. In this state of facts what land had Michael to sell, give up, or assign? The portion he got from his father. That should, in his opinion, be the measure of compensation; and he should not get compensation for what he could not give—namely, the portion occupied by his brother. He believed a respondent was not required by his notice of dispute to negative every possible case for the claimant; and taking all the facts into the most

careful consideration, he thought the case should be remitted to the Court below for further consideration.

MORRIS, J., agreed with the Lord Chief Justice. There never was any general custom known as the Ulster tenant-right custom. The reason why the custom could not before the Land Act be legally recognized lay in the impossibility of defining it. It was as different and inconsistent as were estates and localities in Ulster. The Legislature did not, because it could not, legalize an abstraction—the Ulster tenant-right custom. It did legalize usages, thus recognizing that they were many and different. The only interpretation he could give to the finding of the judge was that the holding was proved subject to an Ulster tenant-right custom—that is, according to the words of the Act, was subject to a usage included under the denomination of the Ulster tenant-right custom. He could not understand the word custom in the question except as usage—that was its statutable meaning. Well, read for “custom” the word “usage,” and the question reserved answered itself, for it would be this—“Is the claimant entitled to claim the benefit of the usage to which the holding was subject, if not discharged from it by sub-dividing in violation of the usage,” and he answered that, of course, he was disentitled. On any view of the case, supposing the claimant to be entitled to the claim he put forward, how could he be entitled to compensation for the entire holding? He (Mr. Justice Morris) failed to recognize any standard, either in strict law or natural justice, for the claimant getting compensation for what he neither possessed nor was entitled to possess. In his judgment, the case should be remitted to the chairman to allow the claimant to amend his claim, to ascertain as a fact if the claimant was required to get the holding into the possession of one occupier before eviction; if he was to dismiss the claim; if he was not to assess the damage he suffered by reason of such usage not having been complied with.

LAWSON, J., concurring with the Lord Chancellor, held that the pleading of the claimant was right. The custom stated in the claim was proved. It was a well-settled principle that a party was not called upon to plead matter, which more properly came from the other side. The error in pleading, if any there was, was on the part of the respondent. In his notice of dispute, he negatived the custom claimed, but at the bar he made a different case—and in his opinion he should not be debarred from doing so by any technical considerations—he admitted the custom, but said the tenant had disentitled himself to it, by violating a rule of

the estate. Lord Leitrim, in his examination before him, swore that no custom of sale existed—and this was inconsistent with the fact of his having made a requirement to sell. The custom proved was that Lord Leitrim should require the tenant to take a certain course, and his lordship not having so required, he was not in a position to treat the sub-division as an absolute forfeiture. As to the measure of damages, Michael, the claimant, was the tenant, and the only person recognized by Lord Leitrim, and if Daniel had attempted to make a claim, the answer to him would be, he was not entitled to do so, never having been recognized as a tenant.

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STEVENSON v. THE EARL OF LEITRIM.\*

*A tenant of lands then subject to the Ulster tenant-right custom having been served with notice to quit in 1867, entered into a written agreement with his landlord to take the lands as tenant from year to year, determinable by six months' notice to quit, with a clause that he should not assign, sub-let, let in con-acre or for a crop, or sub-divide for grazing, or part with the possession of the land, or any part thereof, and that on breach he should pay an additional rent, recoverable as the rent reserved; and with clauses that he should not be entitled to any compensation for any building or improvement unless previously stipulated for by agreement in writing, signed by both parties, and that the tenancy should cease on the bankruptcy or insolvency of the tenant. The landlord determined the tenancy by a notice to quit.*

Held, that the tenant was entitled to the benefit of the Ulster tenant-right custom (Diss. CHATTERTON, V.C., and MORRIS, J.)

*A contract, though inconsistent with the custom, will not deprive a tenant of his right to compensation (Per SULLIVAN, M.R., LAWSON, J., BARRY, J., and DOWSE, B.).*

The learned Chairman pronounced a decree, for £254 from which the Earl of Leitrim appealed. The appeal was heard before Lawson, J., who reserved the following case for this Court:—

“This case came before me at the last Assizes for the county of

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\* Court for Land Cases Reserved; December 17, 1872; January 9. 10, 1873; before the Lord Chancellor, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Vice-Chancellor, Fitzgerald, J., Morris, J., Lawson, J., Barry, J., and Dowse, B.; see *ante*, pp. 206, 283.

Donegal. It was an appeal by the Earl of Leitrim from a decree for £254 made by the Chairman of that county in favour of the Rev. Samuel B. Stevenson.

"The claimant was tenant from year to year of a holding upon the estate of Lord Leitrim. The holding was proved to my satisfaction to be subject to the Ulster tenant-right custom. A notice to quit was served upon the tenant on the 6th April, 1867, for the 1st November following. On the 24th September, 1867, the tenant signed an agreement, which is set forth in the Schedule to this case, No. 3, under which the claimant has since held. It was contended on behalf of the respondent that the claimant had thereby disentitled himself from claiming the benefit of the custom. On behalf of the claimant it was contended that the execution of the agreement did not affect the tenant-right custom, and that the holding remained subject to it.

"With the concurrence of my brother Judge of Assize, Mr. Justice Keogh, I deemed it expedient to reserve said question for the consideration of this Court.

"The question for the consideration of the Court is—whether the agreement of the 24th September, 1867, disentitles the claimant to the benefit of the Ulster tenant-right custom to which the holding was at that time subject, and to which it remained subject, unless discharged therefrom by the operation of said agreement.

"In case the Court shall rule such question in favour of the respondent the decree is to be reversed and the claim dismissed with costs.

"If the Court should rule the question in favour of the claimant the decree for £254 is to be affirmed with costs."

*The Solicitor-General and Holmes*, for the appellant, cited—*Wigglesworth v. Dallison*, Smith's Leading C., Vol. i., p. 538; Smith on Contracts 47, 48; *Webb v. Plummer*, 2 Bar. & Ald. 746; *Hutton v. Warren*, 1 Mee. & Welsb. 466; *Clarke v. Roystone*, 13 Mee. & Welsb. 752; *Roberts v. Barker*, 1 Crompt. & Mee. 808; *Roxburghe v. Robertson*, 2 Bligh O. S. 156; *Blackett v. The Royal Exchange Assurance Company*, 2 Crompt. & Jerv. 244; *Donoughmore v. Forrest*, Ir. Rep., 5 C. L., 443; *Gordon v. Robertson*, 2 Wil. & Shaw 114; *In re estate of Marquis of Waterford*, I. R., 5 Eq., 434.

*Ball*, Q.C., *M'Causland*, Q.C., *Donnell*, and *M'Laughlin*, for the respondent, cited *Browne v. Byrne*, 3 Ell. & Black. 715; *Holding v.*

*Pigott*, 7 Bing. 465; *Faviell v. Gaskoin*, 7 Ex. 273; *Muncey v. Dennis*, 1 Hurl. & Norm. 21; *Parker v. Ibbetson*, 27 Law J. C. P., 236.

The principal arguments relied on are referred to in the judgments.

January 15.—DOWSE, B.—In this case the Rev. Samuel B. Stevenson, a tenant from year to year of a holding, having been served with a notice to quit by his landlord, the respondent, claimed to be paid a certain sum as due to him by way of compensation under a tenant-right custom, to which he contended that the holding was subject. The defendant disputed this claim, and relied on an agreement in writing, dated the 24th September, 1867, as disentitling the claimant to the benefit of this custom. The chairman of the county of Donegal, before whom the claim was heard, decided in favour of the claimant. The respondent appealed to the Assizes, and the learned Judge who heard the appeal states that the holding was proved to his satisfaction to be subject to the Ulster tenant-right custom, by which I understand the custom as set forth in the notice of claim. The learned Judge has, however, reserved for the consideration of this Court, whether the agreement referred to disentitles the claimant to the benefit of the Ulster tenant-right custom, to which the holding was subject at the time the agreement was entered into, and to which it remained subject, unless discharged therefrom by the operation of the agreement. If this court should rule this question in favour of the respondent, the decree of the Chairman is to be reversed, and the claim dismissed, with costs; if, on the other hand, this Court should rule the question in favour of the claimant, the decree for £254 is to be affirmed, with costs.

It appears by this case that before the agreement of the 24th September, 1867, was entered into, a notice to quit had been served upon the tenant on the 6th April, 1867, to quit the holding on the 1st of November following. The question for the decision of the Court upon the facts I have stated is one of very great importance, not only to the parties, but to the public at large. Every assistance has been given to the Court by the counsel who have argued the case for their respective clients. I regret that the Court has not been able to arrive at an unanimous conclusion upon the question, and that therefore it becomes necessary for me to be the first to state my opinion.

I approach the consideration of this question with one important fact clearly established—the learned Judge has, by evidence, been satisfied that this holding was subject to the custom on which the claimant relies;

the onus therefore is cast upon the respondent to oust the right of the claimant to compensation, and this the respondent can only do by successfully showing that the custom has been destroyed by force of the agreement of September, 1867. It has been argued that this agreement is inconsistent with the custom relied upon; that the custom is one and indivisible, and cannot be separated into parts; and that the agreement dealing in terms with a portion of the subject matter of the custom must therefore exclude the application of any other part of the custom to this holding. It is said that there is another contract, specific in its terms, containing a new letting of this holding, and that no parol evidence of a custom inconsistent with the provisions of this agreement is admissible. Several cases have been cited by the respondent's counsel, in which agricultural customs in England and in Scotland have been held to form no part of the contract between the landlord and tenant on the grounds above stated. I am unable to adopt the argument of the respondent's counsel on this point. The custom pleaded here is a custom whereby the tenant in occupation on being about to be evicted or disturbed by the act of his landlord, or on quitting his holding, is permitted to sell his interest (subject to certain provisions as to rent) to any solvent tenant to whom the landlord shall not make reasonable objection: or on resumption of the holding by his landlord, or if his landlord has indicated his intention to resume, the tenant is entitled to the value of the tenant-right interest as if sold to such solvent tenant. That custom has been proved to be attached to this holding, and has accordingly by the Land Act been declared to be legal. It is our plain duty to enforce that custom, and to give the claimant the full benefit of it, if he has not by his own act debarred his holding from the custom. It is conceded that the only act done by him that can have this effect is his entering into the agreement of September, 1867. Has this agreement that effect? I do not intend going through the clauses of this agreement in detail; I wish to express no opinion upon it further than this, that it is very stringent in its terms, and if anything is omitted, the omission can hardly be called an accidental one. It must be borne in mind that when this agreement was entered into the tenant had, by the custom now declared to be legal, the right to sell his interest, or to claim from the landlord the value of that interest, to be ascertained as stated in the claim. The agreement does not alter the nature of the tenancy so far as its duration is concerned, but it expressly provides that the tenant shall not assign, sub-let, let in con-acre or for a crop, or sub-divide for grazing; or part with the possession of any part of the land. It also provides that the tenant shall keep up during his tenancy, and at the termination of his tenancy shall leave and yield up in good and tenant-

able condition all buildings, fences, gates, and watercourses which were, or should be thereafter during the continuance of his tenancy, on the lands. There is also a provision that the tenant should not be paid for improvements, unless certain conditions had been complied with. These are the parts of the agreement that are principally relied upon by the respondent as being inconsistent with the custom. It is also said that the provision as to alienation having dealt with a part of the subject matter of the custom, no other incident can by custom be added to the contract.

I am of opinion that this case may be considered as if there were two contracts made in reference to the holding, the one made legal and binding by statute, the other by the act of the parties. It is perhaps immaterial which may be considered to have priority; the respondent cannot complain if I treat his agreement as being second in point of time. Treating it so, can these contracts be read together? I think they can, and should be so read, and that full effect should be given to the custom so far as it is not inconsistent with the agreement. Assuming for the present that the law as to agricultural and mercantile customs has an application to and governs the case, applying that law, and being bound by its provisions, I would decide in favour of the claimant.

I have carefully considered the cases referred to in the argument, and looked into some others not cited at the bar. The custom has been admitted where it does not alter or contradict the agreement, as in *Wigglesworth v. Dallison* (Doug. 201), where it only added something to it. Baron Parke says, in *Hutton v. Warren* (1 M. & W. 466), all customary obligations not altered by the contract are to remain in force. It will be found that there is a general rule to be deduced from all the cases in the application of that rule. The tendency of the modern cases has been to extend, not to limit, this doctrine. Here the tenant has agreed not to assign or part with the possession during his tenancy; in my opinion that is not inconsistent with the part of the custom that gives him the value of his tenant-right interest, in case the landlord resumes the holding on a notice to quit. I think we are bound to read the parol contract, if I may so call it, and the written one together, if we are able to do so, and we are, in my opinion, able to do so if there is no inconsistency between them; for, I again repeat it, the principle to be deduced from all the cases is, that the evidence of custom is admissible when the incident which it is sought to import into the contract is consistent with the terms of the written instrument. Here the instrument deals with what takes place during the continuance of the tenancy; the custom deals with what takes place if the landlord,



of his own accord, determines it. As to the argument that part of the subject matter is dealt with, and that therefore any evidence of this custom is inadmissible, the cases of *Webb v. Plummer* (2 B. & Ald. 746), and *Muncey v. Dennis* (1 H. & N. 216), one case rejecting, the other allowing the custom, are valuable as showing the true limitations of this doctrine. I think the part of the contract resting on custom not affected in terms by the agreement is separable from the other part, and that effect should be given to it. The real nature of this custom when considered affords strength to this argument. Under the custom, if the tenant served notice of surrender, all he could claim would be compensation, if he was not allowed to sell his interest. The tenant who wished to sell his interest would commence by serving a notice of surrender of his holding; therefore, practically no difficulty can ever arise on the ground of the custom. On the other hand, when the landlord wishes to resume possession, unless the tenant is allowed to sell his interest, he claims compensation; but how is the sale, so called, worked out? Not by an assignment during his term, no notice to quit his holding having been served on the tenant—the case contemplated by the clause in the agreement against alienation—but by a surrender by operation of law of his holding. The new tenant then comes in by the landlord's assent, and in some cases the rent is altered in the manner mentioned in the claim. On the whole, therefore, without going into the question of the construction of the agreement, as to whether the words "without permission," apply to the assignment, or without in any way considering the effect, or trenching on the provisions of the Act of Parliament, I am clearly of opinion that full effect can be given, both to the agreement and to a substantial and separable portion of the custom, the only part of the custom also to which the Court of the Chairman or that of the Judge of Assize under the statute can give any efficacy—that is, the part of the custom that enables the tenant to claim and obtain compensation in the event of a resumption of the holding by the landlord. I have said enough for the decision of this case. I give my decision against the respondent on the assumption that the cases referred to by his counsel do not govern the case. Also, because I have been unable to find out any substantial inconsistency between the part of the custom that deals with the resumption by the landlord and any part of this agreement.

It may be observed that all through my judgment I have assumed only that the cases cited lay down the true doctrine applicable to the case: but I am by no means satisfied that those cases do at all apply to the custom pleaded here. In my opinion, there is in some respects as much inconsistency between an ordinary tenancy from year to year and

this custom as there is between any portion of this agreement and the custom. It is said in a judgment of considerable power, with a great deal of the matter contained in which I entirely disagree, that to assimilate claims such as the one in question to the usages of *Wigglesworth v. Dallison* and *Hutton v. Warren*, regulating merely some small details of farming management, seems to be a mere confusion of thought, for it is to compare things which are not merely unlike, but essentially and generically different. Without going so far as the learned Judge in the decision I have just quoted, I am of opinion that the doctrine of inconsistency as applied in argument at the bar is out of place in a case of this kind.

All we have to do is to find out, by evidence, the tenant-right custom attached to the holding. Men of common sense coming to the discharge of this duty in no pedantic or carping spirit, have found no difficulty in the inquiry. When the inquiry is closed, if the custom is proved, the statute makes the custom legal, whether it is consistent or inconsistent with the tenure, regardless of whether it possesses the incidents required by the common law as a condition to a custom being recognized as legally binding. There is the great change introduced by the Irish Land Act. Once we are persuaded that the custom contemplated by the statute exists and applies to a particular holding, it is our duty as Judges not to take away, unless by the application of clear and sound principles of law, the benefits conferred by the Legislature.

If a holding is proved to be subject to the custom, it can only cease to be subject to it by the landlord purchasing or acquiring the custom from the tenant. By the agreement the respondent has not, in my opinion, either purchased or acquired this custom, and therefore, on both the grounds laid before us by Mr. Stevenson's counsel, my judgment is in favour of the claimant.

BARRY, J.—I concur in the conclusion and in the reasons which have been stated by my brother Dowse. I had intended to have given my views upon the question arising in this case at some length, but as I have been anticipated in the judgment just delivered, I do not think I would be justified in repeating what has been so clearly laid down. I do not think it necessary to assert the general proposition, that no degree of inconsistency between the special terms of an agreement and the custom will exclude the custom. I think there is just reason to doubt that the doctrine of inconsistency applies to such cases as the present, of which the essential characteristic is, that the customs are in some point or other inconsistent with the tenure to which they are applied. I adopt the rule laid down by Baron Parke in *Hutton v. Warren*, 1

M. & W. 466, which has been so often referred to, and applying it to this case, I am of opinion that it is not to be collected that the parties to this agreement intended to exclude the custom.

LAWSON, J.—In this case I concur in the conclusion arrived at by my two brethren who have preceded me, but as I rest my decision upon a single ground, it becomes necessary that I should very shortly state the reasons which have led me to that conclusion.

The holding of the claimant here was of land originally held under an ordinary parol tenancy from year to year, and is found by the case to be subject to the Ulster tenant-right custom stated in the claim. A notice to quit was served by the landlord in the year 1867, and before the expiration of that notice to quit the tenant signed a new agreement on the 24th September, 1867. Under that agreement a new tenancy was created in the holding, still a yearly tenancy, but with new and unusual incidents, one of them being that it was determinable on a six months' notice, given at any period of the year. It contained clauses which it is alleged are inconsistent with the custom, and that its very execution renders it impossible to hold that the land remained still subject to the usage, which, though not then legalized, did as a matter of fact prevail. The clause mainly relied upon as being repugnant to the custom and sufficient to put an end to it is that which binds the tenant absolutely not to assign or part with the possession. The cases decided in England upon agricultural and other customs so familiar to us under the head of *Wigglesworth v. Dallison*, have been relied upon to establish the principle contended for, that if there be an express term in the contract inconsistent with the custom, the custom does not apply. I do not pause to consider these cases in detail or the true rule deducible from them, because there is a prior question to be determined, viz., whether in the case of the custom declared legal by the 1st section of the Act the test of inconsistency can be at all applied to determine whether the holding is subject to the custom. In my opinion it cannot be so applied. Certain "usages prevalent in the province of Ulster" are "declared to be legal, and in the case of any holding found to be subject thereto, shall be enforced in the manner provided by this Act." Now, here is given no definition, or even description, of these usages, except that they are prevalent in the province of Ulster. It is to be established by evidence on detail what the usage is, and that the holding in respect of which the claim is made was subject to it. There is no limitation in this section to usages consistent with the contract of tenancy, nor is the character of the holding to which they may attach defined or restricted. Therefore the plain duty of the tribunal in

administering this Act is to ascertain by evidence what as a matter of fact the usage is, and it is then to be enforced if it applies to the holding. If an usage were to be held not to apply, or be legalized, if inconsistent with the contract of tenancy, it would be, in almost every instance, defeated. The usage pleaded and proved in this case, is wholly inconsistent with and repugnant to an ordinary tenancy from year to year. That is an interest determinable at the will of the landlord, expressed in the form of a legal notice to quit, with an obligation upon the tenant to give up possession at the expiration of six months without being paid anything; but the custom makes it in effect a perpetual interest in the tenant, subject to the payment of a rent, and not determinable by the landlord, except on payment to the tenant of the price which he could obtain for his interest, valued as a perpetual interest of that land, capable of being transmitted to his successor. If the yearly tenancy were expressed in a written instrument containing all the terms which the law implies, there would be an express clause by the tenant to give up possession on the determination of his interest, by the due service of a six months' notice to quit; and the Solicitor-General was obliged to contend, as a necessary consequence of the position for which he argued, that in such a case the usage could not apply. But, is it possible to say that such is the operation of the Act that the usage will attach upon the holding as long as the terms of the tenancy are duly implied, but will cease to apply when they are expressed? There is, for this purpose, no distinction, in law, between an express and an implied contract, they are declared upon and enforced in the same way; unless, indeed, you can apply the principle, that where the contract is in writing you cannot add to or vary it by parol. That principle cannot apply to shut out the evidence of the usage, for we are to inquire whether, in fact, the holding is subject to it; and the existence of a written contract cannot have the effect of preventing the proof of the custom. Customs have been legalized by this Act, which, before it passed, could not have been recognized by the Courts as legal customs, because they were inconsistent with the contract and uncertain. The Legislature having now legalized it, where it exists, in fact, although inconsistent with and repugnant to the contract of tenancy under which the holding was enjoyed, how can inconsistency be a test of the application of the custom? When it is proved to prevail as to yearly tenancies, it attaches upon the holding, and can be enforced. But suppose every yearly tenancy on an estate, instead of resting on parol contract, had been always according to the custom of that estate regulated by written agreements like the present, containing an agreement to give up possession upon the service of a notice to quit, and an

agreement not to sell or assign, and it was proved that notwithstanding the Ulster tenant-right custom prevailed and was always acted upon, it would be, I apprehend, clear that the usage would be legal and capable of being enforced, notwithstanding its inconsistency with the written contract.

If it be inconsistent with the very nature of a tenancy from year to year, and yet is made legal, how can the introduction of further inconsistent clauses repel the usage or deprive it of its legal validity, if it in fact exists. Lord Justice Christian in his judgment in the *Estate of the Marquis of Waterford*, Ir. R. 5 Eq. 453, shows, I think, by unanswerable arguments, that the tenant-right custom of Ulster is inconsistent with a tenancy from year to year, and that the case of *Wigglesworth v. Dallison* has no application to such a custom. He says, "There are two things which are essential in the English cases. First, the terms which the usage is allowed to import must not be inconsistent with the express contract. Second, the usage must itself be certain. Where is the consistency when the gist of the usage is to turn the tenancy into a perpetuity, and where is the certainty when the very essence of the usage is that the landlord may put an end to it at his pleasure?" And again he says, "To assimilate claims of such an order as these, utterly subversive as they are of all notion of a common tenancy, to rights founded on statutes such as the statute of emblements or the Acts for the registration of trees planted by tenants, or such like, which merely qualify certain incidents of tenancies, and to do so by a general law—still more to assimilate them to usages of the *Wigglesworth v. Dallison*, and *Hutton v. Warren* class, regulating some small details of farming management, seems to me to be a mere confusion of thought, for it is to confound things which are not merely unlike, but essentially and generically different."

Notwithstanding then these defects of inconsistency and uncertainty which prevented this custom from being recognized as legal, the Legislature has in clear language declared it to be legal and capable of being enforced, and therefore the custom when found to apply in fact to the holding cannot be disputed on the ground of inconsistency or uncertainty. This view puts the Ulster tenant-right custom on its true foundation, as a distinct right attached to and engrafted upon the holding by the provisions of the statute, raises it above the level of ordinary agricultural customs, and renders it incapable of being frittered away by indirect agreements, as put by Dr. Ball in his very able argument.

In my judgment, therefore, when a holding has been proved to be subject to it, it can only be discharged from it by distinct agreement between the landlord and tenant. The question, therefore, is not one of

inconsistency, but of contract. That being so, the cases referred to have really no application. When a holding has been shown to be subject to the usage, it can only be discharged from it by proof of an agreement between the landlord and the tenant, that the landlord shall have the land discharged of the usage, and that the tenant shall surrender his rights under it. The second paragraph of the first section of the Act indicates how a holding may cease to be subject to the Ulster tenant-right custom, viz., by the landlord purchasing or acquiring it from the tenant before or after the passing of the Act. Can it then be successfully contended that the agreement of 1867 amounts to a contract between the parties, that the landlord shall have the land discharged of the tenant-right custom, and that the tenant shall give it up. I cannot for the reasons already stated draw that conclusion from inconsistencies between the contract and the custom, the custom being inconsistent with the previous tenancy, and yet having prevailed. It lies on the landlord to satisfy the Court when the usage has once been shown to attach, that it has been got rid of by a contract. I do not think that this custom was in the contemplation of the parties to this agreement. If it were it could have been easily expressed ; but the agreement is silent as to it. It had no legal efficacy at the time, and it is not therefore likely that it formed the subject of contract. I am unable to gather any such intention from the language of this instrument.

It was indeed argued by Mr. Holmes very ably, that there was no proof given of usage in reference to lands held under instruments similar to this on the estate, but I think it lay upon the landlord to show as a matter of fact that the usage did not prevail as to holdings so held—if he could have offered evidence that according to the usage of the estate the custom of tenant-right was not recognized or allowed in the case of lands held under similar contracts, he might have succeeded—but no such proof was attempted. It was contended that *ipso facto* the execution of this agreement put an end to the usage by reason of its own provisions being inconsistent with that usage, and not by anything *dehors* the instrument. In my judgment that contention fails, and therefore I decide in favour of the claimant.

MORRIS, J.—As well as I can collect from the facts which transpire on the case, it would appear that the claimant, a Presbyterian clergyman, was, previous to the year 1867, tenant from year to year of a holding on the estate of the respondent—for how long, or at what rent does not appear ; that on the 6th of April, 1867, the respondent served the claimant with notice to quit for the 1st of November then following ; that pending the currency of the notice to quit, viz., upon the 24th of

September, 1867, the claimant entered into a written agreement, signed by him, regulating his future tenancy, and under which he has since held. I shall presently have occasion to refer to it in detail. From the claim it further appears, that the claimant was served with a notice to quit, dated the 21st of August, 1871, for what assigned cause, when served, or when to expire is not stated; from the date, however, it is plain it could expire on the 1st of May, 1872, at the earliest. The claim is dated the 1st of November, 1871; the notice of dispute the 2nd of December, 1871. From the dates it appears that the parties, claimant and respondent, were at issue as to the validity of the claim at least five months before the notice to quit could expire, and for which five months, at all events, the claimant was legally entitled to hold. The case finds that the holding was subject to "the Ulster tenant-right custom." I suppose that was so at the time of the written agreement of September, 1867, and, though not so stated, it has been conceded that "the Ulster tenant-right custom" means the usage stated in the claim. The question before us is—"Does the agreement of September, 1867, disentitle the claimant from relying on that usage?" or, in other words, "Does the agreement by express words or necessary implication exclude the usage to which, at the time of its execution, the holding as an ordinary yearly tenancy was subject?" Now, what was that usage? It is stated in the claim as follows:—"Whereby the tenant in occupation on being about to be evicted or disturbed by the act of his landlord, or to quit his holding, was permitted (and is now entitled) to sell his interest, commonly called his tenant-right, in his holding (subject to the rent to which he is liable or such fairly valued rent as shall be settled from time to time) to any solvent tenant to whom the landlord shall not make reasonable objections, or on resumption of the said holding by his landlord, or if his landlord has indicated his intention to resume the same, is entitled to the value of the said tenant-right interest as if sold to such solvent tenant." That is, the claimant alleges a usage "of a right to sell his holding" on the contingencies either of eviction or disturbance, or of a voluntary quitting by the claimant, or if resumed by the landlord, to be paid by him as if sold. What the resumption of the holding means, as contra-distinguished from an eviction or voluntary quitting, has not been even suggested during the argument, although upon some assumption that there is a difference the judgment of some members of the Court is founded. Now, can a landlord resume possession against the will of the tenant, except by legal eviction, and how can he legally evict without resumption? The language of a notice to quit is a demand from the landlord to his tenant to yield up possession. I know but three modes whereby a party out

of possession can resume it—1st, by the party in possession voluntarily yielding up; 2nd, by taking possession by force; 3rd, by recovery by legal process. There is no pretence of any amicable arrangement such as the 1st mode; no operation under any *lex loci* for the neighbourhood, such as that existing at Glen Swilly was resorted to, such as the 2nd mode. The 3rd mode only remains, viz., legal process by notice to quit; but indeed it does not require this inductive mode of arriving at this result, for the claimant sets out in his claim, it was upon the service of the notice to quit and the refusal to allow him to sell, that his modest claim of £350 accrued, and he offers to accept “the usage and permission to sell his holding” in lieu of his claim. He there states the usage he claims, viz., “a right to sell his holding.” Before considering the agreement in detail and contrasting its terms with the usage claimed, a general reference to the position of the parties under the Land Act is necessary. Up to a recent period it would have been considered trifling with an auditory if you laid down a doctrine which was a truism, viz., that a written agreement between landlord and tenant was to be construed and acted upon according to the intention and expressed meaning of the parties, as would be an agreement between parties in any other relation. This is so no more, for now a man capable of entering into any other contract under the sun is statutorily incapable of contracting with his landlord on certain points. This agreement we have to consider, in so far as it relates to the Ulster tenant-right custom at least, trenches on none of the statutable protection against his own weakness cast round a tenant, and indeed, the claimant is not one of the poor and ignorant whom the clause of the 3rd section of the Land Act was, I suppose, intended to protect. He is a gentleman of education and position, yet even he, deprived of his claim for tenant-right by the operation of his agreement, can fall back on a claim for disturbance, and obtain as full benefit as would, under any circumstances, the humblest tenant in the three less-favoured provinces in this portion of the United Kingdom called Ireland. The reverend claimant and the noble respondent being thus in September, 1867 (to use a figure of speech probably more than ordinarily applicable) at arm’s length, entered into the following agreement. [The learned Judge read the agreement.] It is worthy of consideration, that although the claimant had at that time thirty-seven days of his old tenancy to run, he is not stated in the agreement to be in possession at all. The tenancy created is a very peculiar one. It is determinable on six months’ notice, ending on any gale day; the rent of £18 5s. is to be paid above all taxes and poor rates,—the last half year to be paid in advance; most stringent clauses as to mode of cultivation;



a rent three times the original to be recovered on breach of any of the agreements; a clause of re-entry on insolvency, bankruptcy, &c., of the tenant. Whatever inconsistency it might be contended arose between some of these clauses and the usage claimed, it is unnecessary to consider, because the respondent mainly relies upon two other clauses, and contends that the one in express terms, and the other by necessary implication, exclude the usage claimed. The first of these is the clause in these words—"And that he shall not assign, sub-let, let in con-acre or for a crop, or sub-divide for grazing, or part with the possession of the said land or any part thereof." This is, on the clear grammatical construction of the earlier part of the agreement, an independent agreement not governed by the words—"permission in writing." The 2nd clause is the one at the end relating to improvements. It has not been even alleged that on the estate of the defendant there was ever any usage (of the sort claimed) applicable to tenants' holding under such agreements as the one in question, or that there was any usage except in the cases of ordinary tenants from year to year; but the contention, as argued on the part of the claimant, has been, "that the usage found to exist in ordinary tenancies from year to year is not inconsistent with the agreement in question." To assist in the determination of this question reference was made to several cases (most of these are collected in the valuable note to *Wigglesworth v. Dallison*, 1 Smith's L. Cases, Ed. of 1867, p. 546), viz.:—*Senior v. Armitage*, *Webb v. Plumer*, *Holding v. Pigott*, *Roberts v. Barker*, *Hutton v. Warren*, *Faviell v. Gaskin*, *Muncey v. Dennis*, *Humphrey v. Dale*, *Wilkins v. Wood*, *Roxburghe v. Robertson*, *Gordon v. Robertson*—all cases on the admissibility of evidence of usage for the purpose of annexing incidents to or explaining written contracts between landlord and tenant; and counsel for claimant and respondent respectively have relied upon analogies deduced from them in relation to the present case. I do not intend to refer further to these cases. The only assistance they afford is, in my opinion, the establishment of this principle—"that usage will annex incidents to a written contract on matters with respect to which it is silent, and which may be consistent with the terms of the instrument, but that no evidence can annex a usage which is inconsistent with the terms of the written instrument." That there is this analogy between these cases and the Ulster tenant-right custom as incident to a yearly tenancy was decided by the Lord Chancellor in the remarkable case of *the Estate of Lord Waterford* (L. R. 5 Eq. 442). He says—"The cases in England are not without their value as illustrating the effects of custom in creating rights incidental to tenancies." And again at page 444 he says—"The principles of the English decisions seem to be

of force to show that the right arising from the Ulster custom must be dealt with merely as an incident to the tenancy to which it is attached, and cannot be affected by the conveyance of the Landed Estates' Court so long as that tenancy remains guarded and intact." If this decision of the Lord Chancellor, which was the decision of the Court (though dissented from by the Lord Justice, as I shall refer to) is binding upon us, I ask, is a usage to sell, when evicted or upon leaving voluntarily, consistent with an express contract "not to assign, sub-let, or part with the possession." An ordinary tenant from year to year is entitled to assign, sub-let, and part with possession. This agreement takes away that right. Yet, it is to be decided that the claimant, on being served with notice to quit in August, 1871, could say, as he did say on the 1st of November, by his claim, that he had a right to sell his holding, the assignment that he would attempt being wholly null and void under the Landlord and Tenant Act, 23 & 24 Vic., chap. 154, sec. 10, as decided in *Clifford v. Reilly* (I. R. 4 C. L. 218), and *Donoughmore v. Forrest* (I. R. 5 C. L. 443)! Nay, more, it would follow that he could sell if never disturbed by his landlord, but that for his own purposes he was desirous voluntarily of quitting his holding. It appears to me the usage of "right to sell" is as inconsistent with the clause in the agreement as is the affirmative with the negative of any proposition. To use the words of the Lord Chancellor in the case of *The Duke of Roxburghe v. Robertson* (2 Bligh O. S. 167), "we have here to construe a written contract, and if the Scotch law is to be administered on the same principles as the English law or any law founded on principle, we must hold that the engagements of parties to each other by the express stipulations of a written contract exclude the consideration of the custom of the country"—and these words appear to me, on changing the word "Scotch" into the word "Irish," to describe accurately this case. It scarcely becomes necessary to refer to the other clause in the agreement as to improvements, and I should not dwell on it but that Dr. Ball, in his argument for the claimant, referred us to the opinion of an eminent statesman. I trust we are not to be influenced here by such considerations, but as they are referred to I find that that eminent statesman, in the corrected report of his speech, says of the Ulster tenant-right custom—"It includes two elements; it includes compensation for improvements, and it includes the price of good will." I agree entirely with that definition, and accept them as the two component parts of the claim made. I have disposed of the component part of good will. Now does the agreement deal with the other component part, compensation for improvements? [The learned Judge read the clause as to improvements.] Has not this agreement thus expressly dealt with the two characteristics

of the usage by a contract by the tenant not to claim either of them ? There is again the clause of re-entry in the event of insolvency, &c., of the tenant. Is such a clause consistent with the tenant's assertion of a right to sell his holding, even on such contingencies. Can his right to sell and his landlord's right to re-enter exist simultaneously ? In my judgment, without a shadow of doubt on the subject, the claimant did enter into an agreement wholly inconsistent with the usage he claims.

So far I have proceeded on the assumption that inconsistency is to be the test of our decision, but my brother Lawson, differing *toto cælo* with the Lord Chancellor, considers inconsistency is not the test and is wholly inapplicable. The decision of the Lord Chancellor in *The Waterford Estate*, that the Ulster customs were analogous to the English customs, and were mere incidents of the tenure of a yearly tenancy, was dissented from by the Lord Justice of Appeal, who, in a remarkable judgment on this point, expressed himself as follows :—

“Among many novel theories, which heralded the advent of this measure, there was hardly any more curious to the legal mind than one which, I am sure, few who hear me have forgotten. The discovery was made that the necessity for exceptional legislation for Ireland on the subject of the occupation and ownership of land was in large measure the fault of Irish Judges ; for, if they had only had sufficient enlightenment to have applied to the Ulster tenant-right custom the law of England regarding agricultural usages, as expounded in *Wigglesworth v. Dallison*, and its attendant train of decisions, the need for such legislation as this would have been wholly superseded in Ulster, and partially so in other provinces. So long as this notion was confined to flashy articles in newspapers and magazines, it was merely a thing to smile at. But when it came to be repeated by statesmen, and even (as it was) by lawyers of standing and reputation, one was forced to think with gravity on the lengths of extravagance into which, even in subjects of exact thought, such as law, when they unhappily became the *terrain* for party warfare, men will suffer themselves to be hurried. I will take upon myself to say that anything more utterly frivolous and puerile than this notion never exercised the brain of the flightiest of essayists. The Judge who, three years ago, would have laid down that doctrine would have been greeted with universal and merited derision. I am not going to waste time in the dissection of a proposition which every lawyer who would think of it, merely as a lawyer, would know to be nonsense. Mr. Ryan, as became him, refused to argue it. What is it ? Incorporate by implication as an incident to a contract of tenancy which, as expressed, is one from year to year, determinable on 1st of November, a usage the practical effect of which would be to make that tenancy a perpetuity —

do this under the notion that you are following the English cases of agricultural usages—usages which regulated mere details of farming, right to an away-going crop, course of husbandry, paying for manure when leaving, and such like, all in strict subordination and consistent with the terms of the express tenancy! Have I used too strong a word when I called this nonsense? There are two things which are essential in the English cases. First, the term which the usage is allowed to import must not be inconsistent with the express contract. Second, the usage itself must be certain. Where is the consistency when the *gist* of the usage is to turn the tenancy into a perpetuity; and where is the certainty when the very essence of the usage is that the landlord may put an end to it at his pleasure?"

My brother Lawson concurs in the judgment of the Lord Justice, so far as it establishes that there is an entire inconsistency between the Ulster custom and our ordinary yearly tenancy, and he says, notwithstanding inconsistency in the case of ordinary yearly tenancy, the Ulster custom is made legal by Act of Parliament. Why should it not be so in the present case? Now, I am inclined to agree with the opinion of those who hold with the Lord Justice and my brother Lawson, that the Ulster custom claimed here is inconsistent with even an ordinary yearly tenancy. That was one reason why it could never be held a legal custom until it was made statutably so—but it was only one of the reasons. It did not possess other requisites of a legal custom. It was not an immemorial usage. It was not certain. It was not consistent. It did not affect any district with uniformity, but even varied on particular estates, and thus could not, with any pretence to even elementary knowledge, be maintained as a legal custom. While I thus agree with portions of my brother Lawson's judgment, I cannot concur in the conclusion he has arrived at. In the first place, I conceive an essentially different consideration arises upon an inconsistency between a usage and what are only legal implications of an ordinary yearly tenancy, to that which is applicable when there is an inconsistency between the usage and an express agreement which contains express stipulations in writing excluding the custom. This distinction is noticed in the decision in *Roberts v. Barker* (1 C. & M. 808). Again, I conceive a matter of fact is of itself decisive against the result my brother Lawson arrives at—for, in the case of an ordinary yearly tenancy, this usage, inconsistent though it was, was proved to exist and to be prevalent. The Act declared it, consequently, to be legal and enforceable, whereas in the case of written agreements of the character of the present, there was no evidence or allegation even that any usage was allowed or prevalent. The absence of any such usage, as matter of fact, prevents

the matter from ever arising. I could appreciate the argument if there had been a finding in this case that, notwithstanding such agreements as the present, the usage was prevalent. In its absence, I cannot see even a feature for discussion. The decision of the majority of this Court is thus arrived at from the most opposite premises. The Lord Chancellor and some members of the Court consider that the custom may be an incident to an ordinary yearly tenancy; that the custom is not inconsistent with it; that inconsistency is the test to apply to this agreement, and that, in their opinion, there is no inconsistency. *E. contra*, my brother Lawson, and other members of the majority of this Court, consider that the custom could not be a mere incident of an ordinary yearly tenancy—that the custom is inconsistent with it, and that inconsistency is not the proper test to apply to this agreement. The case is thus somewhat peculiar. It has another peculiarity—that it was fully and finally argued out before this Court, consisting then of seven Judges. It was thought better, from its importance, to have it re-argued. I concurred in that suggestion, and it has now had the advantage of having been heard before a Court of nine judges, three of whom were not at the first argument. It has had the disadvantage of not being now heard before one Judge who was at the first argument—Baron Deasy—and who has been absent unavoidably from the second hearing. Being in a minority, I regret the more that my judgment is not now fortified in the result of it, as it would have been at the conclusion of the first argument, by the concurrence of that eminent and sagacious Judge. I have, in another place, expressed my opinion of the singular inaptitude of this Court of sixteen Judges, collected from all the Courts in the Hall, for the duty assigned to it. No Court in these buildings could physically accommodate this tribunal in its full attendance. It has become already and must become still more a shifting and fluctuating tribunal. The attendance upon it must be as varied as inclination, convenience, or unavoidable engagements elsewhere will permit. Its decisions, instead of being homogeneous—instead of having the result of two sane minds applied to different cases, may depend upon the chance majority of a varying attendance—individual responsibility is lessened and takes refuge in numbers—add to which that the law to be administered is a novel one—in some respects at least antagonistic to preconceived ideas on the law of real property—the legislation, in many respects, deliberately left vague, and requiring to be moulded by judicial decision. No matter what the supreme importance of the question, the decision here is made final. If a fishwife abused another, or a coalporter beat another, and an action of slander or assault was the consequence, any legal question arising on such

comparatively trifling subjects can be brought before the House of Lords for final decision ; but questions of property, amounting, in the computation of a leading public man, to £100,000,000, are not deemed worthy of reaching that great legal tribunal, and must be finally decided here. The practical decision that has been arrived at here is—That a tenant who, in September, 1867, entered into a written agreement, regulating the terms of his tenancy, in 1872, without any allegation that he has been deprived of any of the rights which he bargained for in his contract under his hand, becomes entitled to a lump sum of £254, or 14½ years' rent of his holding, and for having enjoyed an occupation of four or five years, is recouped the rent he paid, and receives, in addition, a bonus of 10 years' rent. In my judgment, the claimant is disentitled to the claim he made, and the decision ought to be against him.

**FITZGERALD, J.**—The question before us is of the greatest importance, and needs to be considered with calmness and discretion. In administering this great statute—the greatest Act of modern legislation—we are especially called upon to examine the various questions arising upon it with caution and with temper, that we may be able to weigh and determine the just rights of the landlord upon the one hand, and the claims of the tenant upon the other. We are not likely to be aided in arriving at a conclusion consistent with a true and just construction of the Act either by unavailing criticism on its objects or operation, or by suggesting imaginary difficulties in addition to those which really do exist.

In my opinion, our decision in the present case in favour of the landlord would strike at the root of the Ulster tenant-right, which it was the object of this Act of Parliament if possible to preserve. Still, however, we are not to decide in favour of the tenant without grave consideration.

The case states “that the holding was proved to be subject to the Ulster tenant-right custom ;” and further, that it remained subject to it “unless discharged therefrom by the operation of the agreement of the 24th Sept., 1867.” It was urged by the Solicitor-General that no evidence was given on the part of the claimant that the special yearly tenancy created by that agreement was subject to the Ulster custom, but it seems to me that, as it had been proved, that the holding was subject to that custom, it lay on the respondent to prove, as a matter of fact, that the custom was inapplicable where the character of the tenure had been changed by substituting a special agreement in writing for an ordinary verbal contract of tenancy. No such evidence was given, and we are therefore compelled to determine the case as to the effect of the agreement itself, unaided by any parol proof.

When once it has been established that the Ulster tenant-right custom exists as to any particular holding, it is declared by the statute "to be legal," and that it "shall be enforced in manner provided by the Act."

We have, therefore, to consider and determine whether the holding has been discharged from tenant-right by the agreement. We ought not to arrive at such a conclusion unless there has been an express stipulation to that effect, or unless the terms of the new tenure are such as to forbid the continuance of the custom as applied to the particular holding. The Solicitor-General was obliged necessarily to push his argument to the extent that the custom would be inapplicable to and wholly inconsistent with a tenancy under lease, whether for lives or years, containing the usual covenant to give up the tenement, with all improvements, &c., at the end of the term; but there seems now to be no doubt that, as a matter of fact, the Ulster custom may and does apply in such cases. In the case of *Austin v. Scott*, we have had it so reported by the Lord Chief Justice of the Common Pleas; and I observe, in a recent case\* before the Chairman of Fermanagh, that Lord Erne is reported to have stated that on his estate it made no difference whether the tenancy was from year to year or by lease for lives or years, but he added that if the lessee assigned during the term without the assent of the lessor the assignee had no claim to the tenant-right custom. I take this from a newspaper report only. Lord Erne was the respondent, and examined as a witness. The agreement now under consideration of the 24th of Sept., 1867, created a special tenancy from year to year, subject to a provision that the tenant should not "assign, sub-let, or part with possession of the land." I forbear to notice any minor provisions, for the Solicitor-General rested his argument on the clause against assignment. It seems to me to be wholly unimportant to consider whether the provision against assignment was qualified by the words "without permission in writing;" for as there is no stipulation that an assignment contrary to the agreement would operate as a forfeiture of the tenancy, there is no doubt that an assignment, "with the consent in writing of the landlord or his agent," given in manner prescribed by the 10th section of the 23 & 24 Vic., c. 154, would have been valid and effectual. The agreement, then, created a yearly tenancy, with an express term against assignment or parting with the possession; and the question is, does the stipulation, by necessary inference, negative the Ulster custom. In my opinion, there is no such inconsistency as to compel us to arrive at that conclusion. The custom and practice of many estates where tenant-right is acknowledged and is in full force is,

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\* *Graham v. Earl of Erne*, post, p. 405.

that the tenant cannot assign without the assent of the landlord, and that if he should do so any claim to the tenant custom is forfeited. So, in the present instance, it seems that the provision against alienation is not necessarily inconsistent with tenant-right, although a breach of it may cause a forfeiture of the claim. "Tenant-right" does not necessarily include a claim on the tenant's part to assign his tenancy during the term. It arises in almost all instances at the expiration of the tenancy, or when the period for the termination of the tenant's estate has been fixed by notice to quit or otherwise, and is carried into effect not by assignment but by surrender by operation of law where that becomes necessary. The outgoing tenant finds some person willing to purchase his "occupation" or "good-will," and to become tenant in his place. He nominates the intended new tenant to the landlord, who may accept him, if he is unobjectionable, as tenant at the old rent or an increased rent. If, on the other hand, the nominee is objectionable the landlord rejects him, and a new nomination takes place. Should the landlord capriciously reject the tenant's nominee, or desire to have the possession for himself, then he becomes liable to pay the value of the tenant-right, and thus acquires it for himself.

I have come to the conclusion that there is nothing in this agreement which necessarily discharges the holding in question from the tenant-right custom; and that being the simple question reserved for this Court, I think our decision should be in favour of the tenant.

It has been suggested from the Bench that the claim before us was exorbitant and the amount allowed excessive. In the administration of this statute there is no duty more incumbent on the judge than to set his face against and defeat extortionate or immoderate claims, whether made under colour of Ulster tenant-right or for compensation for disturbance and for improvements, and I have no doubt that duty was most anxiously performed by the eminent and prudent judge who has stated this case for our decision.

The VICE-CHANCELLOR.—I am unable to concur in the conclusion at which the majority of the Court have arrived, and I agree with the opinion of Morris J. I wish to state fully my reasons for the view which I entertain.

The Act has imposed upon the judges who have to administer it a very difficult duty in respect of what it terms the Ulster tenant-right custom. It has, perhaps, from the necessity of the case, left it to them without the aid of any definition or interpretation, to say in each case what that so-called custom is. They must ascertain by evidence in the case of each holding whether there was at the passing of the Act any



and what usage of this description so vaguely mentioned to which it was subject. When this has been so ascertained they must give effect to it in the manner prescribed.

These varying usages wanted all or most of the legal elements necessary to constitute a valid custom, and were not binding in law, being merely usual indulgences given by the landlords of Ulster to their tenants. The Act appears to me to have clothed them with the same validity that would have attended legal customs, and to have placed them in no higher position. The first section, which is that which applies to the Ulster tenant-right, throughout designates these usages so validated as a custom, and I can find nothing in the Act to warrant us in giving them any higher operation. The statute being in this respect an interference with the pre-existing rights of property should, I think, not be extended by judicial exposition.

The first matter arising upon any such inquiry is to ascertain whether the particular holding was at the passing of the Act subject to the alleged usage. If it was not, the statute is, of course, in this respect inoperative, and the claimant must resort to his remedies under the other sections. It is not, in my opinion, enough to show that at some antecedent period tenant-right had been conceded by the landlord to the tenants of the holding; for though this may have been so, the circumstances of it may have altered, and the usage may have ceased to exist. Nor do I think that this change can be confined to cases when under the second clause of the first section, the landlord has, in the strict sense of the words, purchased or acquired the Ulster tenant-right custom to which the holding was formerly subject. That clause does not profess to exclude all other modes of terminating the usage, and, in my opinion, one other mode of so doing, and that of not unfrequent occurrence, is by the landlord and tenant entering into a contract which excluded it. It was not disputed by the counsel for the claimant, that an express stipulation, that the holding should not thenceforth be subject to the previously existing usage would have that effect, and I cannot conceive that if such express stipulations were proved it should notwithstanding be held that such a right in the tenant could exist. The amount of proof necessary to establish the existence of any such usage must vary according to the circumstances of each particular case, and when there is shown to be a contract whether by parol, by writing under hand only, or by deed, containing express terms *prima facie* excluding the right to claim the benefit of such usage, the claimant must go beyond the mere proof that when such a contract does not exist, the usage has prevailed. If he is precluded from so doing either by the want of such evidence, or by its legal inadmissibility, his claim

must, in my judgment, fail. The case of *Wilkins v. Wood*, cited by the claimant's counsel, is not inconsistent with this view. What was decided there was, that the judge was wrong in withdrawing from the jury the evidence of witnesses to prove the custom, who on cross-examination stated they did not know of any instances of the custom having prevailed when the letting had been\*by written instrument, and who, therefore, could not say whether it applied to such cases or not. That case proceeded on the ground now well settled that evidence of a custom is admissible to add to or explain written instruments, and there was no question as to the inconsistency or repugnancy between the instrument and the custom. I wish to avoid expressing any opinion as to what terms should be deemed sufficient to exclude, either *prima facie*, or absolutely, a claim to have the benefit of such a usage, except so far as it is necessary for the decision of the present case.

And here, I may say, with every respect for opinions that may have been expressed to the contrary, that I consider that the rules of law established in reference to agricultural, commercial, and other like customs, have a very close application to these legalized usages. I do not, of course, mean by this that, independently of the statute, any legal validity could by, or by analogy to, these rules have been possibly given to these voluntary usages. But I think that where evidence of legal customs was by those rules excluded in the case of express contracts inconsistent with them, in like cases the statutory operation of these tenant-right usages should also be excluded. The principle on which the cases as to customs proceed are laid down by Parke, B., in *Hutton v. Warren*, in terms which are generally referred to as being the best exposition of it. He says that "it is the presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to these known usages." It follows from this that where the express terms of the contract purport to be all those by which the parties intended to be bound evidence of custom is inadmissible to add to or vary them; and where they purport to deal completely with any particular subject, the evidence is, in like manner, inadmissible in reference to that subject. Also, wherever there are expressed terms inconsistent with the custom, the former must prevail. I think it unnecessary to go through the cases which have been cited, as all recognize this principle and differ only as to the application of it to the particular facts. There is an essential difference in this respect between the terms of a contract implied by law and those expressed by the parties. *Expressum cessare facit tacitum* is the maxim stating the rule. The terms of a contract which the law implies are those *quæ tacite*

*insunt*, and it is those which the custom is allowed to vary or supersede. The law implies in an ordinary letting the right of the tenant to farm as he pleases so that he commit no waste. The custom may contract this and say, the tenant must farm in a particular way. Again, the law implies that the hay, straw, and manure on the farm at the determination of the tenancy are the property of the tenant, but the custom may interfere and say, they must be left on the land for the use of the incoming tenant. But while rights and obligations implied by law can be thus altered by custom, express contracts cannot, and where they apply they exclude the operation of the custom. In the case of an ordinary yearly tenancy, created by parol, the law implies a contract on the part of the tenant to yield up, and quit possession at its determination, and, as was held for instance in *Henderson v. Squire* (L. R., 4 Q. B., 170), the landlord may maintain an action on such contract. The parties might undoubtedly have by express contract added to this a term that the landlord should either accept a nominee of the outgoing tenant in his place, or pay him a sum of money. It will still remain a yearly tenancy, and all the incidents implied by law would remain the same with the addition of this term. In the same way a custom, to the same effect, if clothed with the legal requisites of validity, would have in my opinion precisely the same operation. But in all those cases the terms tacitly added by the law yield to the custom, while the custom again yields to the expressions of the contract.

It has been objected to the applying these rules to the usages in question, that doing so would have the effect of excluding such usages, not only in the case of express contracts, but also of ordinary parol lettings. It is said that there cannot be a greater inconsistency between them and any express contract, not in so many words excluding tenant-right, than between them and the legal attributes of an ordinary tenancy from year to year. But in every case where a custom has been allowed to add to or modify a contract, it is inconsistent with, and therefore alters what the rights of the parties would have been but for the operation of the custom. There would be nothing to prevent the parties to an ordinary parol letting from year to year, adding in express terms a stipulation that the tenant should have the right to require his landlord to accept as tenant in his place any person to whom the tenant might sell his interest, and that if his landlord should proceed to determine the tenancy he should pay the tenant what he could get for his interest if allowed to sell. There is no reason why a yearly tenancy, with all the other terms which the law implies should not co-exist with such express stipulation. If a custom existed to the same effect, I cannot see any ground for holding that it could not be imported into the terms

of any ordinary letting from year to year. But all this would be changed if the *express* terms of the letting were inconsistent with the custom; and that inconsistency need not be express, but may be evinced by implication from the terms of the contract.

The question, then, must, in my opinion, really come to this—Is the custom, as pleaded by the claim, and, as we must take it, proved by the claimant, inconsistent with the written contract between him and the landlord? Does the written contract exclude the usage, either by sufficiently showing on the face of it that it was intended to contain all the terms of the tenancy, or by reasonable implication, showing that the parties meant that the holding should not, as regards this particular letting, be subject to the usage? The usage put forward in the claim is that the tenant should, either if his landlord is about to evict him, or he is about to quit of his own motion, be permitted to sell his interest in his holding to any solvent tenant to whom no objection is made by the landlord; or, if his landlord resumes possession, or indicates his intention to do so, the tenant should be entitled to the value of his tenant-right interest, as if sold to a solvent tenant. It has been strongly contended, on the part of the claimant, that there are here either two different usages, or two parts of a single usage, one applicable to the case of the landlord not himself resuming the possession, and the other to the case of his desiring to do so; that, in the former event, the tenant was permitted to sell his interest to a third party, and that in the latter, the landlord was bound to pay what such party otherwise would have paid. This amounts to no more than that the landlord, if he desires to put an end to the tenancy, will permit the tenant either to sell his interest to an unobjectionable party, or will pay for it himself. It is, in my opinion, clearly one single usage, applicable, too, to one single event, so far as the landlord is concerned, namely, his proceeding to disturb the possession of his tenant. The portion of it which is twofold is the mode in which the landlord consents to compensate the tenant in the event of disturbance, namely, permitting him to sell and transfer the possession to another, or to pay him as much as he could have got in the market. The very terms in which the measure of the landlord's payment, if he chose to buy himself, is expressly pointed to the tenant being able to sell to a third party; and they substituted the landlord for such purchaser. Where the tenant has not the power to sell his interest, the landlord, in my judgment, cannot be required to pay. One seems to me to hang upon the other, and both must, I think, stand or fall together. If the express contract is inconsistent with the right to sell to a third party, the obligation of the landlord to pay is also excluded.

This privilege of the tenant was not confined to the landlord seeking

to put him out, but extended to the tenant's desiring to leave of his own accord. Therefore, if he were to give notice of surrender, the landlord must let him sell, or must buy from him. It also seems to me clear, on the terms of the claim, that if the landlord were to serve notice to quit, the tenant would thereupon, and before the expiration of his tenancy, be entitled to exercise his right of selling his interest. The service of a notice to quit is in itself a disturbance, as appears by the 4th General Order. Even on an indication of the landlord's intention to resume possession, the tenant's privilege arises according to the language of this claim, so that before a notice to quit is served, the same privilege may spring up. I do not forget that, in the case of a yearly tenancy, where the possession is transferred by the tenant to a third party, and the landlord afterwards accepts rent from such party, it will create a new tenancy between them ; but still the original tenant does not the less part with the possession to that party.

I shall now turn to the agreement to see if, though this usage is not by express terms excluded, there are found in it words which exclude it by reasonable implication. In examining the written agreement it is not to be expected that it should be found to exclude in terms the tenant-right usage, even in case the parties never contemplated that it should continue to be acted on. It had then no legal operation, and there were probably few who at that time expected that it would soon be made binding on the landlord. We must look to see of what elements the alleged usage was composed, for these may be fairly taken to have been in the view of both landlord and tenant, and see if they are excluded by reasonable implication.

I consider them to have been compensation for improvements, and for disturbance. The main policy of the Act is undoubtedly to allow compensation for these, and for nothing else. The equivalent given for tenant-right compensation is at the option of the tenant, to be compensation for improvements and disturbance.

It is important to note the way in which the claims of tenants to compensation for improvements and disturbance are dealt with in some of the clauses of the Act. By sec. 4 a tenant of a holding under a lease or written contract made before the passing of the Act, is not entitled on being disturbed by the act of the landlord, or on quitting his holding, to any compensation in respect of any improvement, his right to which compensation is expressly excluded by such lease or contract. Again by sec. 13, when a holding for which compensation is claimed under sec. 3, is held under a tenancy from year to year existing at the time of the passing of the Act, and such tenancy is assigned without the consent of the landlord, and the landlord does not accept the assignee as his

tenant, no compensation shall be payable by the landlord when (amongst other things) the holding forms part of an estate upon which the assignment of holdings without the consent or approval of the landlord, is contrary to, or not warranted by the practice prevalent on the estate. These clauses, though not applicable to the case of tenant-right custom, are, I think, important in showing that in cases under the other head of compensation, it cannot be claimed for improvements contrary to express contract, made before the Act, and that even without an express prohibition of alienation, a tenant who assigns, without consent, cannot claim unless he can show that assignments are warranted by the practice prevalent upon the estate.

Before coming to the particular clauses of the written contract directly affecting this question, I must say that in my opinion the whole frame of the instrument is inconsistent with an intention of the parties that the holding should be still subject to the tenant-right usage. It purports to be a complete contract, and regulates with much particularity the terms of the holding. It is throughout a personal contract with Mr. Stevenson; the word assigns, as applied to the tenant, is not to be found in it; the clause that the tenancy shall cease in case of bankruptcy, insolvency, or imprisonment on civil or criminal process for over 14 days, is plainly personal to him. These by themselves would not probably be operative, but they are important in combination with the clauses more distinctly applicable as strengthening the implication. The clause which prohibits assigning, sub-letting, or parting with the possession, seems to me directly opposed to the incorporation of the usage, and this opposition is the more pointed by the omission here of the words "without permission in writing from the said Earl," which are to be found in reference to the making of improvements. I cannot see how, consistently with this, it could be possible for the tenant, on being about to be disturbed by the act of his landlord, or voluntarily to quit his holding, to claim the right to sell to another. The proposition seems to me inconsistent not only with the spirit but with the letter of this clause. Again, the tenant stipulates expressly that on the termination of his tenancy he will yield up in good condition, all buildings, &c.; and again, that nothing in the contract shall be deemed to entitle him to any compensation for any improvements made upon the premises, unless they should have previously been stipulated for, and specified by some article or agreement in writing signed by both landlord and tenant. In the face of these express stipulations, and against what appears to me to be the general intention of the instrument, I am of opinion that the contention of the claimant, that his holding still remained subject to the usage, cannot be maintained.

He insists that, notwithstanding, he should have the right to sell, and consequently to part with the possession in the events named, or to insist on his landlord, if he decline to permit him to do so, paying him the value of his tenant-right interest, as if sold to a solvent tenant. On what would that value depend? On the value of improvements which he had contracted not to claim for, except by virtue of a new agreement if any, and on the value of his title to compel his landlord to buy up the right to sell his interest and part with the possession to another, which he had bound himself not to do. How is it consistent with the unqualified contract, not to assign or part with the possession to claim the right to give notice of surrender and say to his landlord, you must let me part with the possession to my own convenience, or you shall pay a heavy penalty for refusing? It seems to me that this amounts not only to a reasonable, but to a necessary implication, that this usage was not to be incorporated into the contract.

It was said that, because the usage had no legal validity, it could not be permitted in law to affect the contract, and that, therefore, it cannot be supposed to have been excluded by implication. But it does not follow that it was not excluded because it was not legally binding. If so, it would give it a greater efficacy than if it were a legal custom. The question is, was the contract inconsistent with this pre-existing usage, whether a matter of legal or moral obligation? If it was, it ceased to affect the holding, and there was nothing left for the statute to operate upon.

In my opinion, it was inconsistent with, and was excluded by the agreement, and the claim should be disallowed.

MONAHAN, C.J.—As I concur in the opinion of the majority of the Court, I did not think it would be necessary for me to do more than express that concurrence. Still, as all the other members of the Court have expressed their reasons for the judgment they have pronounced, I think it better that I should also shortly state the reasons of the conclusion to which I have come.

It appears from the case stated by my brother Lawson, that prior to September, 1867, the claimant, Mr. Stevenson, held the premises in question as tenant from year to year, and that the premises so held were subject to the ordinary tenant-right custom, which was, that if the landlord was about determining the tenancy by notice to quit or otherwise, the tenant was entitled to sell to a new tenant to be approved of by the landlord or his agent; but if the landlord did not wish to have a new tenant come in on the farm the custom was that he should pay to the outgoing tenant a sum of money equal to what could have

been got from a respectable, unobjectionable tenant, such as the landlord would approve of, but though the transaction between the outgoing and incoming tenant was called a sale, there was not what strictly should be called a sale, nor was there any conveyance to be executed by the old to the new tenant. The process was, that the new tenant having been approved of by the landlord or his agent, the sum to be paid was deposited by him with the agent in the office. Thereout was paid in the first instance all rent due to the landlord, and any other sums properly payable by the outgoing tenant, and the balance of the purchase-money was paid to the outgoing tenant, and thereupon the new tenant was substituted as the tenant of the farm instead of the old tenant; so that the process was not strictly a sale or conveyance of the land by the old to the new tenant, but operated as a surrender by operation of law of the old tenancy and a creation of a new one. This being the subsisting relation between Lord Leitrim and Mr. Stevenson, the agreement of the 24th September, 1867, was entered into between them, which operated as a surrender by operation of law of the then subsisting tenancy and the creation of a new one. The only portion of this new agreement bearing on the Ulster tenant-right custom is that by which the tenant agrees that he shall not assign, sub-let, let in con-acre, or for a crop, or sub-divide for grazing or part with the possession of said land, or any part thereof. I confess I entertain a very serious doubt whether this stipulation is inconsistent with any part of the tenant-right custom, which is not to sell to a stranger, but to give up the possession with the assent of the landlord to a third person, so as to effect a surrender of the old tenant's interest; but whatever doubt there may be of this I am satisfied there is no inconsistency with the part of the custom that if the landlord don't wish to give the farm to a third person, but wishes to reserve the possession himself, that he should pay for the surrender of the farm the same sum as would be paid by a third person if he assented to the third person becoming the tenant. I am, therefore, of opinion that the case should be ruled in favour of the claimant, who is entitled to have the decree for £254 affirmed.

The MASTER of the ROLLS.—In my opinion, the decree for the claimant in this case should be affirmed. The first question which suggests itself for our consideration and upon which we must come to a conclusion is as to the meaning and effect of the first section of the Act of Parliament now before us. That question is to be determined on the construction of the language used in the statute. Upon that alone we must ground our judgment. In delivering his opinion in the House



of Lords, upon the case of *Grey v. Pearson* (6 H. L. C. 101), Lord Wensleydale says—

“I have been long and deeply impressed with the wisdom of the rule, now I believe universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and, indeed, statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.”

This is laid down by Mr. Justice Barton, in a very excellent opinion, which is to be found in the case of *Warburton v. Loveland* (1 H. & B. 648).

The same view of the duty of a court of law is very emphatically expressed by Chief Baron Pollock, in the case of *Miller v. Salamons* (7 Ex. 560), where he says—

“Where the meaning of a statute is plain and clear, we have nothing to do with its policy or impolicy, its justice or injustice, its being framed according to the views of right or the contrary. If the meaning of the language used by the Legislature be plain and clear, we have nothing to do but to obey it—to administer it as we find it; and I think to take a different course is to abandon the office of a judge and to assume the province of legislation.”

I take the liberty of adding that, in my opinion, considerations of the policy of a statute by a judge when he is called on to interpret its language involve in them this additional mischief, that a judge who allows them to get possession of his mind is apt, when the supposed policy of the statute does not meet his approval, to be led away from the strict observance of those rules of construction by which alone he ought to be guided to a decision. Therefore, I put altogether aside the question whether this statute was politic or impolitic. I also put aside the question as to the constitution of this Court or its members. I will only say for myself that, although I am sitting here as one of a Court composed of nine Judges, I do not give my judgment in this case with a sense of responsibility less deep than if alone and unsupported, I was endeavouring to administer justice between these parties in the Court in which I alone preside.

What are the words of the first section of the Act of Parliament upon which the question here has arisen? [His Lordship read the first section of Landlord and Tenant Act, 1870.] I think the language of this section admits of no doubt whatever. My opinion upon that section is

clear that, no matter what be the inconsistency between the usage which is found to prevail and the terms of the written or sealed instrument, or the verbal contract under which the tenant holds, the usage is made valid and binding, and the tenant is entitled to the benefit of it at the time and in the manner prescribed by the Act. That is the first point to be determined.

The moment that proposition is established, it is plain to my mind that the argument which was addressed to us on the part of Lord Leitrim, was pervaded by two capital fallacies. The first, that there is an analogy between the agricultural customs of England and the tenant-right usages legalized by this Act of Parliament; the second, that there is a distinction to be observed between a contract implied by law and the same contract expressly entered into between two parties, whose assent to such contract is signified by their names being attached to a written instrument. With respect to the first, I am of opinion that between the English customs and the Ulster tenant-right there is no analogy whatever. And, as to the second, I am not aware of any authority which would, in the smallest degree, justify us in holding that there is any such distinction as that which has been suggested between a contract implied by law and the same contract expressed in writing. On the contrary, all the authorities seem to me to enforce the view that no such distinction exists, and that the liabilities and rights of the parties respectively thereto are precisely the same, and that the contracts themselves are to be sued on exactly in the same manner, save the mere form, that if the written instrument is sealed, the action in such case would be in covenant. And I certainly cannot discover in the case of *Roberts v. Barker* (1 Cr. & M. 808), to which Mr. Justice Morris has referred, anything to warrant the supposition that the court there gave colour to the notion that a contract which the law implies was something different from the same contract expressed in writing. In the case of *Humfrey v. Dale* (7 E. & B. 274), Lord Campbell says in reference to implying additional terms to written contracts that an incident "will be admissible unless it labours under the objection of introducing something repugnant to or inconsistent with the term of the written instrument." And, again, he says, "to fall within the exception of repugnancy, the incident must be such as if expressed in the written contract would make it insensible or inconsistent." It seems to me to be too much to say in the face of what appears to be settled law, that there is any difference between contracts in writing and the same contracts when they are implied by law.

In the particular case before us, it appears that Mr. Stevenson, before entering into this written agreement, held his land as tenant

from year to year to Lord Leitrim, and that, being merely such tenant, his holding was subject to the usage set out in the claim. The moment that fact is proved—and there is no dispute as to it—the fallacy of supposing that there is here any similarity or analogy to the English agricultural customs seems to me at once apparent. The contract implied by law in the case of a tenancy from year to year is that the tenant, on the determination of his tenancy, will deliver up his holding to the landlord. Yet, in the face of that contract, it is found, as a matter of undisputed fact, that he had the right to assign his interest in it to a solvent tenant, and that if Lord Leitrim refused to accept the proposed substitute, he should pay to Mr. Stevenson the amount which he could have obtained from the new tenant if the assignment had been permitted to take place. Could anything be more inconsistent with the contract under which he held than this right? These facts conclusively establish that the test of inconsistency, by which it has been proposed to try this case and to exclude the custom under which this claim is made, is altogether a mistaken one, and that the English authorities are wholly inapplicable, and can throw no light whatever on the question whether a tenant who claims the benefit of an Ulster usage can assert his right to it under section 1 of this Act of Parliament, notwithstanding that it is inconsistent with his written contract. It was to escape from the difficulty which the finding that the holding of Mr. Stevenson was usually subject to the usage set out in the claim, placed the landlord in, that it was suggested that the agreement under which Stevenson held, as tenant from year to year since 1867, being in writing, must be regarded as something different from what it would have been had it been simply a parol contract. I think it will be found that in all the cases it is taken for granted that, even in the case of written contracts, we are to read the implied contract as a portion of the written contract. When it is implied, it is to form one of its terms, and it is by so doing that we are to discover whether in any given case they can stand together.

Now, suppose that Mr. Stevenson was tenant from year to year, after this Act had passed, of this holding, proved to be subject to this now legalized custom; that he held at first merely under a parol contract, but that he subsequently entered into an agreement in writing similar in all respects to that which had previously existed by parol, namely, that at the end of his tenancy he would deliver up his land to the landlord. Would that contract, simply because it had been reduced to writing, destroy the tenant-right and exclude the usage legalized by the Act, in which the contract before was attached to the holding? It appears to me impossible so to hold on legal principles; such a construc-

tion would be to make the written contract a mere trap, by which the tenant could be effectually deprived of a property which had been his by long-continued and widely-recognized usage, and which it was the special object of this Act of Parliament to render permanently secure. It, therefore, appears to me that these English cases have no force or analogy to guide us here, and that the mere inconsistency of an agreement by the tenant, who has this custom validated and legalized for him by statute, will not operate to exclude the latter, but that it must be expressly and definitely dealt with by the terms of the contract itself, and that in this particular case, the terms of the contract being, in my opinion, not a whit more inconsistent with the usage than would have been the terms of his original tenancy, if reduced to writing, the contract does not deprive the tenant of the benefit of the usage.

I may add that, in my opinion, even if the English cases on agricultural customs were to be considered analogous, and that consistency between the agreement and the custom is to be the test, I think the claimant is still entitled to succeed. I agree in what has been already said during the argument, that the claim, as sought and argued under the conditions of the case before us, is not at all a claim to assign the premises in violation of the agreement. It is a simple claim to nominate a solvent and unobjectionable tenant to Lord Leitrim, and on refusal of such tenant by Lord Leitrim, to obtain the payment of the sum of money which would have been obtained from the proposed tenant if the nomination had been accepted. That claim is not inconsistent with the written agreement. It is made on or in view of the termination of the tenancy, and on or in view of Lord Leitrim taking the lands into his own possession. The usage as proved seems to me precisely applicable to this state of things. The tenant does not want to assign or violate his agreement on that behalf; he is simply trying to protect himself under the usage which his claim shows to exist in the particular circumstances in which he is placed by his Lordship's act. And the usage, if reasonably construed, embraces and is applicable to the precise state of facts which has occurred. Apply the test approved of in *Humfrey v. Dale*, and suppose the following clause inserted at the end of the written contract :—"Provided always, that if the said Stevenson, on serving a notice to quit, or being served with such notice, shall tender to the said Lord Leitrim a solvent and unobjectionable tenant, and that if Lord Leitrim refuses to accept such tenant he shall pay to the said Stevenson such sum of money as the said proposed tenant would have paid if he had been permitted to enter into possession of the holding,"—where is the inconsistency of such a clause with that which forbids assignment? I cannot see it; and further, I think that the case of

*Muncey v. Dennis*, 1 H. & N., 216, admitting, as it did, the principle of *Holding v. Pigott*, 7 Bing., 465, is a very precise authority that they may well stand together or in the claim. I may observe that the word resume, which has been commented on, I understand, to mean the result of refusing the tenant's nomination of a new tenant, *i.e.*, the landlord himself taking the possession from any new tenant. On every ground I think that the claimant is entitled to succeed.

LORD CHANCELLOR.—Concurring in opinion with the majority of the Court, I should not think it necessary to add anything to the judgments which have been delivered, but that I desire, in a case of such importance, briefly to indicate the precise ground on which I base my own decision.

It is not my function to vindicate the character or constitution of this Court, or to assert the sufficiency of the reasons which justified the passing of the Land Act. Our duty in this place is merely to discharge, as best we can, our judicial business, and, without criticism or complaint, to accept loyally and administer faithfully the provisions of the Statute.

Neither do I deem it necessary to consider the conflicting views which found expression in the Court of Appeal with reference to the Waterford estate and the practice of the Landed Estates' Court. It seems to me that, on either of those views, the claimant is equally entitled to succeed, and I shall not occupy time by re-stating opinions and reasons which are already on record with reference to the special circumstances of that case, and which would have little pertinency to the question for decision here.

As to the effect of inconsistency between the contract and the custom, I do not think the point properly arises. According to my conception of the statement of the learned Judge, there is no inconsistency whatever between them in the matter before us; and it is, therefore, unnecessary to pronounce what might have been its operation, if it had existed, or to lay down any abstract doctrine on the subject as applicable in every case.

But I may say that the able argument of the Solicitor-General on the effect of inconsistency between an agreement for a tenancy from year to year and a tenant-right custom legalized by the statute, failed to satisfy me of the distinction which he sought to take between such an agreement in writing with an undertaking to give up the premises, and an agreement in writing or by parol without such an undertaking. It is settled, beyond controversy, that in every tenancy there is an implied contract to deliver up, at the termination of it, possession to the

landlord ; and the tenant is equally bound by this contract, whether it be express or whether it be implied. It is equally the subject of action, and equally enforceable between the parties. I cannot understand how, in the one case, the custom is admissible to modify the agreement, whilst, in the other, it is not. And, in my view, if the Solicitor-General be right in his contention as to the effect on an express contract for restoration, it should be as operative on that which is implied ; and so, in every case of a tenancy from year to year, the tenant-right would be nullified, as antagonizing the antecedent contract. This conclusion no one has ventured to draw ; and I confess it seemed to me, that when the Solicitor-General admitted that an agreement in writing for a tenancy, not providing in terms for the extinguishment of possession, was consistent with the enjoyment of tenant-right at the close of the term, he substantially conceded the title of the claimant, and negatived the notion that, by the mere inconsistency relied on, even if it had existence, that title could be destroyed.

But, however this may be, I prefer to base my judgment in this case on its special facts and circumstances ; and I have satisfied myself that there is no real repugnance between the agreement of '67 and the claim for tenant-right. The cases are decisive, that, as to mercantile or agricultural customs, clearly shown to exist, there must be necessary and irreconcilable repugnancy between the conditions of a lease or an agreement and a custom of the kind, before it can be denied operation as modifying and controlling the contract of the parties to it. And, whatever may be said with respect to the nature and effect of such customs as compared with the tenant-right custom under the Land Act no one will pretend that the latter is of less force, or can be more easily excluded or overborne than the former. We must, therefore, see whether there is absolute and necessary repugnancy, before we deny the benefit of the usage to the person who, according to the findings of the case, is entitled to that benefit, unless the agreement has plainly deprived him of it. And we must further see whether, according to the true mind and purpose of the landlord and the tenant, there was a contract, express or implied, in the contemplation of the parties, and intelligently accepted by them, disentitling the tenant, at the end of his term, to rest upon the custom ?

In my opinion, there is no such repugnancy in this case ; such a contract was not contemplated by the parties ; and they had not, nor could they have had, any intention to enter into it.

I do not care to consider, whether the italicised words in the more important clause of the agreement—*“without permission in writing”*—should be taken to have application to all the sub-divisions of it, or only

to some of them ; and not to that which guards against assignment. Any assignment, notwithstanding, might have been made by the tenant, "*with permission*," and I do not see that the argument, either way, is helped or harmed by the view which may be taken as to these words.

But what was the assignment, in the view of the parties, against which they sought really to guard ? Manifestly, in my opinion, an assignment, during the tenancy, of an interest remaining in the tenant, and not an assignment after its termination when all his interest had passed away. All the words employed—"assign," "sub-let," "let in con-acre," "part with the possession of the land,"—assume, for the purpose of their operation, that that possession shall not have ceased, and that the tenancy shall still endure. There is in them no reference whatever to the conclusion of it ; no provision for anything to happen after it ; no restraint against action upon any interest save that subsisting during its continuance ; and they have no relation to any customary right to arise when it is ended.

And, from the nature of the case, this must have been so. Tenant-right had no existence as a legal entity in 1867. In contracting about the tenancy, the landlord had no need to guard against a claim which the law did not recognize ; and the tenant had nothing to assign save his interest in his term. No doubt, tenant-right, as it was then, operating simply at the will and by the permission of the landlord, might have been referred to in terms, and the tenant might have, in terms, relinquished all claim to it, even as a matter of the merest favour. But no such reference is made in fact, as there was no motive for the making of it ; and no one, I think, can doubt, that, when the claimant was made to agree not to assign or part with the possession of the land, the parties only thought of a continuing tenancy. Neither of them had the least notion of dealing with a custom then, without legal force or substance, in any way, for the present or the future.

So far as we have evidence before us, the claimant kept his engagement. He did not assign, or sub-let, or part with the possession of the land during the period of his tenancy ; and it was concluded by the act of Lord Leitrim, who served the notice to quit, and determined the tenant's interest, leaving him nothing to assign—so that he had no power, even if he had wished it, afterwards to break the agreement.

Taking this as a fair representation of the facts, and the relation of the parties, can it be reasonably said that the agreement was in any way necessarily repugnant to, or irreconcilable with, the claim on foot of the tenant-right custom which is found to have attached to the claimant's holding, and which must have so continued, unless the provisions against assignment put an end to it ?

The claim rests on a custom which seems to me to be one custom—as the counsel for Lord Leitrim contended—but to have two aspects and an alternative operation. The first regards the position of the occupier still in possession, “being about to be evicted or to quit his holding.” and entitles him to sell his interest to any solvent tenant to whom the landlord shall not make reasonable objection ; and the second gives him the value of his tenant-right interest on resumption of the holding by the landlord, or indication of his purpose to resume possession of it. The custom, so described, regards two perfectly separate and independent states of fact—the one in which the tenant, being still possessed, can sell ; the other, in which the landlord’s resumption takes from him the possibility of selling. In the first, he gets what a solvent tenant actually gives ; and, in the second, an amount to be measured by ascertaining what would be given by such a tenant. The alternative provision, on resumption, is not connected with its companion in any way save by reference to this mode of ascertaining the price ; and it can be read as a complete and integral description of a custom, although the entire antecedent provision, as to sale, be elided from the claim.

This being so, I think it clear that the second limb of the custom, as it has been called, standing separate and apart, is not at all inconsistent with, or repugnant to, the clause against assignment. The clause had reference to the continuance of the tenancy ; the compensation on resumption is to be had on its ending. The clause contemplates, and is only concerned with, a still subsisting interest, which is absorbed and extinguished by the landlord when he resumes possession.

With the first branch of the custom, the clause may be in antagonism, for they both deal with a tenant continuing in possession and having power to sell. But with the second, it seems to me entirely consistent and harmonious. I think the words of Chief Justice Tyndal as to the agreement which he had to consider in *Holding v. Pigot* (6 Bing., 478) are curiously applicable here :—“It adverts to nothing that is to take place at the termination of the tenancy ; it speaks only of these terms of holding during its continuance. There is nothing, therefore, in such an agreement directly at variance with such a custom between landlord and tenant when such custom does not come into force and existence until the expiration of the term. The rights of the landlord and tenant may be governed by the terms of the agreement during the tenancy, and by the terms of the custom immediately after.”

Here, as there, the agreement regards the period during which the tenancy continues, and the custom, as to resumption, the period after it has expired ; and, therefore, they do not appear to me, in the smallest measure, to clash against each other.



The test insisted on by Lord Campbell, in *Humphrey v. Dale* (7 El. & Bl. 275), that "To fall within the exception of repugnancy, the incident must be such as is expressed, and the written contract would make it insensible or inconsistent," may be fairly applied, in this case, in the interest of the claimant; for if to the agreement not to assign or part with the possession of the land—that is, as I have said, during the continuance of the tenancy—it were added, that, at its ending, on resumption by the landlord, he shall receive either a specified sum or so much as could be got from a solvent tenant for his tenant-right interest, if he were in a condition to sell, and had permission to do so, there would be nothing whatever, in my opinion, to make the agreement, with that addition, "inconsistent or insensible."

It seems settled by authority, as it is consistent with reason, that if, as in this case, there be a custom divisible into parts and of an alternative character, according to the state of circumstances to which it applies itself; the failure of one branch of it does not injure the other, and the destruction of a part cannot involve the extinction of the whole. I do not understand why the effect of resumption should be lost because the right to sell cannot be exercised, or how a clause, which, as in *Muncey v. Dennis*, (1 H. & N., 216), relates only to "what is to be done or not to be done during a term, and not what is to be done at its termination and on the tenant's quitting," can be held in this case, more than that, to deprive the tenant of a legal right accruing to him effectually only when the term expires.

On these grounds, which seem to me abundantly sufficient for the purpose of decision on the matter in hand, I am of opinion that the tenant's claim has been sustained, and that the decree of the learned and able Chairman of Donegal for £254 must be affirmed with costs.

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WM. WILLIAMSON v. THE EARL OF ANTRIM.\*

Held—*The 15th section applies to tenant-right claims.*

Quære—*The only form of claim for tenant-right contemplated by the Act is one for compensation.*

The case was reserved by Barry, J., before whom it was heard

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\* Court for Land Cases Reserved; before the Lord Chancellor, the Master of the Rolls, Monahan, C.J., the Vice-Chancellor, Fitzgerald, J., Morris, J., Lawson, J., Barry, J., and Dowse, B.

on appeal from the dismiss of the Chairman of County Antrim. The case reserved by the learned Judge was as follows:—

“The holding is part of the town-parks of Ballymoney, in the County of Antrim.

“It was proved that the tenant-right usage relied upon by the claimant exists in respect of the said town-parks generally, and that the holding is subject thereto unless such tenant-right has been ‘acquired’ by the landlord, and the holding has ceased to be subject thereto within the meaning of the first section of the Act, in the manner hereinafter mentioned.

“It was proved that in or about the year 1851 (the precise time was not fixed in evidence), being a period of great agricultural distress, the holding, together with other holdings in the town-parks, was surrendered by the then tenant to the landlord, and remained in his hands without any occupying tenant for some time, the duration of which was not fixed. It was alleged on the part of the respondent, but not proved, that the holding so remained for a year and a half. However it was clear on the evidence that there was no intention or desire on the landlord’s part to take the holding permanently into his own occupation, and that it so remained in the landlord’s possession only until a tenant could be procured.

“In this state of things the holding was in or about the year 1852 let by parol to one Williamson, as tenant from year to year in the ordinary way, without any fine or premium, nothing being said or expressly stipulated for by either landlord or tenant in respect of tenant-right. The tenancy so created became vested in the claimant, and it is in right thereof he makes this claim.

“It was proved that the tenant-right usage of the estate had not in the case of others of the holdings so surrendered as aforesaid and similarly re-let, been regarded as altered or affected by the surrender, and that the tenants coming into occupation under such re-lettings had been permitted to sell in accordance with the custom.

“No such dealing had taken place in respect of the claimant’s holding, but the evidence established, to my satisfaction, that the landlord, when so re-letting the surrendered holdings, in fact entertained no idea that the tenant-right had been extinguished by the surrender nor any intention that the tenants to whom the holdings were so re-let were to hold the lands discharged of the tenant-

right, and that he believed that they would hold in the same manner, and on the same terms as the other tenants from year to year on the estate who are entitled to such tenant-right; and it was not alleged on the part of the respondent that, but for the clause in the Land Act respecting the 'acquisition' of the tenant-right by the landlord, the claimant would (by reason of the surrender) have been refused the benefit of the usage. There was, however, a collateral dispute (the particulars of which are now immaterial) which caused the landlord to stand on his strict right.

"On this state of facts two questions of law were raised by the respondent, viz. :—

"1st. That the holding being a 'town-park' was excluded by the 15th section from the operation of 'The Landlord and Tenant (Ireland) Act, 1870.'

"2nd. That the fact of the holding having been surrendered to the landlord, and remained for any time in his possession, as before stated, operated as an acquisition by the landlord of the tenant-right under the first section of the Act, and that by reason of such acquisition the holding had thenceforward ceased to be, and is not now subject to such custom.

"The Chairman had decided the first question in favour of the claimant, and the second in favour of the respondent, and therefore dismissed the claim.

"I have (with the concurrence of the Lord Chief Baron, who was my colleague at said assizes) reserved the two questions for the determination of this Court.

"If the Court decide either question in favour of the respondent, the dismiss is to be affirmed with costs.

"If the Court decide both questions in favour of the claimant, the dismiss is to be reversed, and decree made for the claimant for £34, being £45 less by a set-off of £11 for a year's rent up to November, 1871."

The argument was, in the first instance, confined to the first of these questions, the Court stating that if this question were determined in favour of the respondent, it would not be necessary to argue the second.

*Andrews, Q.C., Donnell, and H. Holmes*, appeared for the claimant.

*Falkiner, Q.C., Porter, Q.C., and Orr*, appeared for the respondent.

The LORD CHANCELLOR, delivering the judgment of the Court,

held that the dismiss should be affirmed, on the ground that the claim being one for compensation under section 1, it was barred by the 15th section, which excluded from compensation under that section any holding found to be town-parks.

## JUDGES' DECISIONS.

### IRVINE v. M'KELVEY.\*

*The holding of a tenant under a special agreement to give up the lands when required, and who had on a previous occasion consented to the landlord's resuming possession, only claiming for grass seed, is not subject to tenant-right.*

DOWSE, B., observed that the claim was brought in the court below, under the Ulster custom, and in the alternative for reclamation of waste lands and other improvements. The Chairman dismissed the claim under the Ulster custom, but allowed compensation on the other count of the claim. From that decision Irvine appealed, believing that he was entitled to the benefit of the Ulster custom. He (his Lordship) had come to the conclusion that he would dismiss the claim for compensation under the custom. He was satisfied on the evidence given in the case, so far as it was necessary for him to be judicially satisfied, that the custom of tenant-right known in this county, and set forth in the claim, prevails on the Blessington estate, and on that portion of it in the possession of Robert Scott. But the question to be decided in this case was, whether the Ulster custom attached to the holding in respect of which this claim was brought. He had arrived at the conclusion, not that tenant-right was attached to the farm by virtue of Scott, the former landlord, having acquired it or purchased it; if that were the question to be decided, he would reserve it for the Court for Land Cases Reserved, on the ground that it was an important point which required to be judicially settled once and for ever. He did not decide the case on the ground that the landlord had acquired the tenant-right, but he would state shortly his reasons for dismissing the claim. The estate of which this holding forms a part belonged to Lord Blessington. The purchaser of that portion of the estate in possession of the Scott

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\* Tyrone Spring Assizes, 1873; before Dowse, B.

family, finding that David Scott did not pay his rent punctually, when two and a-half years' rent were due, said the rent of David's holding was raised from £22 to £33. That seemed a curious mode of compelling the tenant (David Scott) to pay up the arrears; however, that was the course adopted. Ultimately, David Scott was evicted, and he made no application for tenant-right. He (his Lordship) thought it was always evidence against a man having a right if he never asked for the benefits which that right conferred. David Scott never asked for tenant-right. An offer was made to him to purchase the farm, but it turned out on the evidence afterwards that David Scott said he thought he had as good a right to the farm as the landlord. It was ably argued by Mr. Holmes that if his Lordship was satisfied the tenant-right custom attached to this holding at that time, the right under that custom was not ousted by what afterwards took place. He (his Lordship) could not take up the case at that stage. He would have to take into consideration the various transactions between the parties. And the question he would have to consider in the case was, at the time this claim was filed, did tenant-right attach to the holding? When Robert Irvine, the claimant and appellant, got into possession, it was arranged that he should pay £44 rent. He paid no fine. Before Irvine got possession the landlord held the farm for one year, and cropped it. He afterwards let it, without fine, to Irvine for one year, under lease—from 1st November, 1864, till 1st November, 1865. The rent for this year was paid in advance, and when this year expired, Irvine was allowed to continue in possession. He paid the half-year's rent due in May, '66, in the month of December, 1865. In the month of August, '66, the landlord put up this farm for sale by public auction. It was then purchased by M'Kelvey, the present respondent. The deed of conveyance was made to M'Kelvey in April, 1867, and a few days after that Irvine, who was allowed to continue as tenant, paid a half-year's rent. Now, who was M'Kelvey? He was not a large landed proprietor, in receipt of thousands each year, with a large number of tenants living under him. M'Kelvey was a man who bought this farm for himself, to put a member of his own family into it. He bought the farm, and paid £1,320 for it, and he stated that he was not paid more than three per cent. for his money. It is clear that at the time he made this purchase he never supposed he would have to pay four or five hundred pounds additional. But what happened afterwards? M'Kelvey went to survey the lands, and he saw Irvine. Irvine on that occasion said—"If you put me out will you allow me for the grass seed?" M'Kelvey said, in reply, that he would do what was fair. Now, was that the observation of a man who was conscious he had a claim? The Act was not passed at that

time; but then it should be observed that the Act did not create a custom, but merely legalized the custom existing at the time. Irvine, before the deed of conveyance was made out to M'Kelvey, said—"Don't serve me with a notice to quit, and any time you want the farm for yourself or your son I'll give it." Was that the observation of a man who expected to get £700? If he had any claim, would he not rather have said—"I have a right to sell to an unobjectionable tenant." He did not say that; what he did say was this—"Don't serve me with a notice to quit, and I'll give you the farm any time you require it for yourself or son." M'Kelvey then said he would hold out no encouragement, but that he would hold Irvine by his former arrangement, which was to give up the farm when he required it. Under all the circumstances, his Lordship came to the conclusion that the custom of tenant-right did not attach to this holding. He therefore dismissed the claim under the custom, and affirmed the decision of the Chairman.

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VERNER v. GREER.\*

*A tenant under the Ulster custom is not entitled to claim compensation where the sale interfered with by the landlord is not bonâ fide, and there is no other disturbance.*

In this case, claimant, who held from year to year, had sold the farm, and the landlord refused to accept the purchaser, because the price was over five years' rent, which he asserted was the usage of the estate; and the Chairman, holding that this usage was proved, dismissed the case.

DOWSE, B., affirmed the decision, but on a different ground, that the sale which the landlord interfered with was not *bonâ fide*. If it had become necessary he would have reserved for the Court above the question whether a tenant could bring his landlord into court where the latter merely prevented a sale, but did not desire to disturb the tenant in the occupation of his holding, and also the question whether the landlord could, without the consent of the tenant, limit the price of the tenant-right. But the decision of these questions not being necessary, he would dismiss the appeal.

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\* Tyrone Spring Assizes, 1873; before Dowse, B.

## LOUGHRAN AND SMYTH v. MACGEOUGH.\*

*In determining what is the usage of an estate, regard should be had not merely to the transactions of recent years, but to the whole series of tenant-right transactions which have occurred on the estate, as disclosed in the evidence.*

This was an appeal by the respondent from a decree of the Chairman, who had awarded £8 an acre as compensation under the Ulster tenant-right custom. The respondent admitted that the holding, one of 5 acres, was subject to the custom, but alleged that the usage of the estate restricted the tenant-right to £5 an acre. Smyth was the tenant in occupation, and proceeded to sell. Loughran asked and got permission of the landlord to purchase—but it was intimated to him that a portion of the holding would be required for one M'Coy, an adjoining tenant. Loughran thereupon purchased the tenant-right for £12 an acre. The landlord refused to allow more than £5 an acre to be given. He afterwards demanded for M'Coy a portion of the holding, one acre, which Loughran refused, as an unreasonable demand. Notice to quit was served. The evidence on the appeal was confined to the question whether the estate rule alleged by the respondent was the usage to which the holding was subject.

KEOGH, J.—It is for the respondent to prove that: he alleges the affirmative.

R. J. MacGeough deposed that from 1861 until his father's death, he had managed, as agent, his father's estates; and since then he had had the sole management of that portion of the estate (about one-third), which descended to himself. He then handed in a list of tenant-right sales, nearly two hundred in number, in none of which had the payment exceeded £5 an acre.

Mr. Armstrong, for claimant, deposed that he had been employed for 20 years and more in the rent-office of the respondent's father, when Mr. M'Watty was agent, up to the death of the latter in 1861; and during that time several hundred sales took place. There was no interference in any instance with the amount of the purchase money.

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\* Armagh Spring Assizes, 1873; before Keogh, J.

*Donnell*, for claimant, cited *Stevenson v. Lord Leitrim*, Court for Land Cases Reserved, *ante*, p. 340; and *Friel v. Earl Leitrim*, decided by Judge Lawson, *ante*, p. 209.

KEOGH, J.:—The sole question I have to determine is, whether the usage prevalent on this estate, and to which this holding is subject, is an usage of sale unrestricted in amount, or one limited to £5 an acre. In deciding that, I am not to look solely to the transactions of the last month, or the last year, or even the last twenty years. I do not consider that a system existing a year or two on an estate amounts to a custom, and in the same way any interference with a custom must not be an interference by the landlord, but such continuous succession of events as would show that there had been really an alteration amounting to a new custom. In other words, I must not accept as conclusive the system practised in 1861 or 1871, but I must let my mind range over a long period, in order to conclude what is the custom of the estate. I do not think I ought to limit the custom by the acts of Mr. MacGeough or the acts of his father, or the acts of any one person, or on any particular holding. I have here to ascertain the usage on the estate—not the absolute amount the tenant is entitled to, this having been decided by the Chairman, and, as I think, fairly. Well, I think the usage is to sell to the highest and best bidder. Mr. MacGeough handed in a return compiled from his books, containing the sales on his part of the estate—one-third of the whole—for some years back, but the prices ranged from £1 up to £5 per acre. It so happened that there had been no purchase at more than £5 an acre on this property since the present Mr. MacGeough became owner, but the prices were fluctuating, and did not constitute a legalized custom. All I now have to do is to find out what was the custom previous to the passing of this Act; and to do so I must look over a larger range of time than ten or eleven years, for it would require a longer time to establish tenant-right. Now, let us look over the whole range of events and transactions extending over a period of 30 years, as detailed by Mr. Armstrong, a gentleman who had been in connexion with the family, and whose accuracy had not been impeached, when he stated to-day that he had known hundreds of cases of sales of the tenant-right, and there was no limit put to the price of tenant-right. I do not consider this custom had been altered by the acts of the present proprietor. There was no limit on the estate proved to my satisfaction, and I therefore think the tenant is entitled to the tenant-right; that is, to the value of his land. I therefore affirm the Chairman's decree, with costs.



## M'CULLOUGH v. WARING.\*

*Tenant-right will not attach to a farm held under a lease made in 1851, it being admitted that the custom only began to be practised on the estate in 1850. Whether the custom extends to leasehold tenancies is a matter of fact. A landlord cannot by recent alterations destroy an usage of ancient date, if that usage can be shown to attach to the holding. A claimant held not entitled under sec. 1, is entitled to have his claim under the general provisions of the Act remitted to the Chairman for his adjudication.*

This was an appeal by the claimant from a dismiss of his claim under the Ulster tenant-right custom. The Chairman had called upon the claimant to elect, and on his refusal dismissed the claim.

LAWSON, J. :—The general question of the effect of a lease on the operation of the Ulster custom has been recently considered and decided in the Court for Land Cases Reserved, in the case of *Stevenson v. Earl of Leitrim*; and I am, of course, bound by and accede to the decision there pronounced—that though there is in a lease a covenant to give up possession at its expiration, or any other covenant, yet if, notwithstanding that covenant, it was found that, according to the usage on the estate, the tenant-right custom prevailed with respect to lands held under such leases, it must prevail, notwithstanding any inconsistency there might be between the custom and the covenant. But I cannot at all accede to the argument put forward by Mr. Monroe, that when you show that a tenant-right usage prevailed in respect to tenancies from year to year on an estate, you must therefore infer that it exists with respect to leasehold interests. I think it requisite, when it is sought to engraft a leasehold interest, the existence of a usage, to show by clear evidence that that usage exists, and applies to the leasehold interest; and for this plain reason, that in respect of a tenancy from year to year there is no security of tenure at all for the tenant—he might be turned out by a notice to quit, or his rent might be raised through the pressure of a notice to quit. But in the case of a lease there is a security of tenure during the term, and the landlord has no power to raise the rent or interfere with the terms of the tenancy.† In every case that has come

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\* Down Spring Assizes, 1873; before Lawson, J.

† Under the tenant-right system, the difference in point of security was very slight. Mr. M'Cartan, agent for the Waring estate, stated before the Devon Commission that he would as soon not have a lease as have one, if the tenant-right is acknowledged.

before me where a claim is made for tenant-right at the end of a lease, I have followed the same rule as that laid down by Chief Justice Monahan in the case of *Austin v. Scott*—namely, to consider as a matter of fact on the evidence, and not as a matter of law, whether the usage on the estate applies to leaseholders. This case is different from any I have yet had to consider, because the introduction of tenant-right on this Kilmore estate was very recent in its origin, and it was not known at all up to 1850, when it was introduced by Mr. M'Cartan. That is very different from a case where, so long as the memory of man extended, the tenant-right usage had applied on an estate. I have always held that a landlord could not by recent alteration destroy a usage of ancient date, if that usage could be shown to attach to the holding. In this case the usage is a modern usage—it dates from 1850. Is there any ground to say that a tenant-right usage attached to this holding, which was held under a lease, dated 20th December, 1851? At that date the landlord, Major Waring, took up the lands from Mr. M'Mullan, who held them before. I am not going to hold that that of itself would extinguish tenant-right; that is not my opinion. But in 1847, when the property was given up by Mr. M'Mullan, no tenant-right existed on that estate, and therefore there was no tenant-right for Major Waring to acquire. Then we come to 1851, and upon that occasion, Major Waring, being in possession of the lands, and there being no usage of tenant-right whatever existing on the estate (for it was only begun to be established by Mr. M'Cartan in 1851), makes a lease to Humphreys, and gets a fine. That was enough to show at all events that in 1851 these lands were worth £80 a-year; for if the tenant was to pay £70 a-year, and to give a fine of £150, that was equivalent to an admission that the land was worth £80 a-year. That being the state of things in 1851, Mr. Humphreys, in 1861, proposes to sell his interest to the present claimant, for a very extravagant sum—namely, £600, and £50 for gates, &c. Now, what took place on that occasion? Samuel M'Cullough, the person who negotiated the sale for the claimant, tells us what took place between himself and Major Waring, who is now dead. We know that, as there was a covenant against alienation in the lease, his brother couldn't safely purchase without Major Waring's consent. He came to get that consent, and he got it, and then he asks Major Waring if he will give him an undertaking not to raise the rent at the expiration of

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"If the landlord denies the tenant-right, the tenant is better with a lease; if it is acknowledged, it makes no difference" (Vol. i., p. 463). In the first half of the present century, the fact that the rent was fixed during the existence of the lease, told as much against as for the tenant, owing to the fall in rents after the war, and in 1821, 1829, 1834-'5, 1842-'3, and during the famine. See *ante*, Bk. I., Part i., c. 7.

the lease. I consider such a request as that wholly inconsistent with any notion in his mind that there was any tenant-right existing in respect of this holding. And what did Major Waring say? He said, "No; he would not promise that, but when the lease expired he would take care that a reasonable rent should be put on"—that was, he wouldn't take any unreasonable advantage of him. M'Cullough made an observation that his brother was buying an interest in the land, and not the lease. I attach no weight to that. I think that what he went to Major Waring for was to get his consent to the assignment of the lease, and I believe that his application to him to give a promise not to increase the rent shows that they were dealing on the footing of the lease, and not on the footing of anything else. The landlord promised that at the end of the lease M'Cullough's case would be fairly considered, and we know what occurs in almost all well regulated estates—that the tenant in possession gets a preference over an outsider to continue on at the end of the lease if he is willing to do so, and if he pays what the landlord thinks is a reasonable rent, and what a fair man would agree to. But that is not tenant-right—nothing like it. Well, then, is there any evidence that during that interval—between 1850 and the period when the lease expired—there was a custom to allow tenant-right to a person holding under lease? I think the cases produced failed to establish such a usage. There was the case of a man who held under a lease, and surrendered it, and became tenant from year to year; and there was the case of a yearly tenant who was allowed to sell. They had heard Mrs. Laughlin, who had two leases, and surrendered both, and took a new one. She would not purchase unless she got a new lease, showing she was relying on the security which a new lease gave. There was no evidence to satisfy any judicial mind that there existed on this property of Kilmore any usage applicable to this particular holding. Besides that, I am bound to say that in this instance Major Waring had strictly carried out that honourable understanding his father entered into on the evidence of Samuel M'Cullough. By one of the letters which had been given in evidence he offered to let the lands for £90 a-year. The rise of rent proposed to be put on was almost nominal. Any one who knew that a man got a fine of £150 in 1851 for this land, would not say that it was unreasonable in 1873, without any fine at all, to ask an increase of £6 a-year. Even if tenant right did exist in this case, I would have very great doubts whether, under the 18th section of the Act, I wouldn't be bound to take the refusal of that reasonable offer into consideration as unreasonable conduct on the part of the tenant.\* I am coerced to dismiss the case.

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\* This species of unreasonable conduct would appear to be intended by sec. 18 to operate as a forfeiture of compensation under sec. 3 only (see proviso to section).

His Lordship remitted the claim under the general provisions of the Act, to the Chairman, and refused to make it a condition of the order that the claimant should pay the costs of the dismiss under the custom.

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DALY v. SCOTT.\*

*A holding of three statute acres, with three houses on it, in one of which, abutting on the street of Bundoran, the claimant lived, and the land stretching behind the house, held not to be town-parks.*

Mr. Scott, the landlord, appealed from the Chairman's decree, giving £125 for the tenant-right of a holding of a little more than three statute acres. On the holding, which had dwindled down from one of nine acres by sales of portions for building ground, were three small houses, in one of which the claimant lived. The house abutted on the street of Bundoran, and the land was just behind the house. It had been portion of the Conolly estate, on which it was admitted that unrestricted tenant-right prevailed.

Holmes, for appellant, insisted that the holding was a town-park, and therefore excluded from compensation (*Williamson v. Earl of Antrim*, ante, p. 377). The land was now required for building sites.

Irvine, for claimant, argued that the fact of Bundoran having increased in size, and spread round this holding, ought not to prejudice old tenants who were there before the village had extended so far.

Dowse, B., held that the holding in question was not town-parks, the tenant residing on the holding; but on the evidence of value, he reduced the decree to £100.

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WILSON v. WILLIS.†

*Holding of hired labourer.*

The Chairman had dismissed the claim in this case, on the ground that it was a labourer's holding. It consisted of between two and three roods of land, which had been let to the tenant at a yearly rent, but on condition, as alleged by the landlord, that he would work when required. The tenant also kept a grocery shop;

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\* Donegal Spring Assizes, 1873; before Dowse; B.

† Armagh Spring Assizes, 1873; before Keogh, J.

and the rent was paid in labour and in goods bought at the shop. The tenant admitted that when he could not work for the landlord, he paid another man to go in his place.

KEOGH, J., held that this was a holding held by the tenant as a hired labourer, and therefore excluded from compensation under sec. 15, sub-sec. 2.

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M'CORRY v. JOHNSTON.\*

*The mere payment of rent by labour does not exclude a tenant from compensation under the Land Act.*

*A tenant under a tenancy, less than a tenancy from year to year, created before the passing of the Act, is not entitled to compensation.*

This was an appeal from the decision of the Chairman, who refused to give compensation to M'Corry under the Land Act, but suggested an appeal.

Alexander, solicitor, for the claimant, said the ejectment had been brought describing appellant's holding as a tenancy from week to week, and the opposite party had denied that he was entitled to compensation, owing to the provisions of sec. 15, sub-sec. 2, of the Land Act. Payment of rent in labour did not disentitle a claimant to compensation (*Martin v. Trodden*, 6 I. L. T. Rep., 37, and *post* 415; *Molony v. Garrihy*, 5 I. L. T. Rep., 15, and Donnell's Land Act, p. 293).

M'Corry was examined, and proved that he had been giving three days' work in the week for the place, and described a great many improvements which he had made. Sometimes he did not give the entire number of days; he owed his landlord money, or the latter owed it to him. They settled up half-yearly.

Holmes argued that from the interpretation clause it was clear the appellant had never been "a tenant" within the meaning of the Act. His holding was not from year to year. The man had been formerly a servant of Mr. Johnston, and got this place to induce him to continue in his service. Therefore, under sec. 15, sub-sec. 2, he could not get compensation. The man was not a tenant from year to year before the passing of the Act, and, therefore, could not come under the 3rd or 4th section.

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\* Fermanagh Spring Assizes, 1873; before Dowse, J.

DOWSE, B., as at present advised, was rather against Mr. Alexander, but would reserve judgment. It was not the 15th section which he thought weighed against the tenant, but the fact of his not being a tenant from year to year before the passing of the Act. He thought the 15th sec. was introduced to meet a different class of cases, and that the mere payment of rent by labour did not exclude a tenant from compensation under the Land Act. He would not decide such a case hastily. The Act was passed for a great and important purpose, and he would, as far as he could within the law, give the tenant the full benefit which the legislature intended to confer upon him. Subsequently, his Lordship held that under the interpretation section (sec. 70), the claimant, holding under a tenancy from week to week, created before the passing of the Act, did not fall within the definition of tenant in the Act; and therefore he dismissed the appeal.

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MACDERMOT v. IRVINE.\*

*Circumstances affecting the amount of compensation for disturbance. Costs, as a general rule, should abide the event.*

In 1855, the claimant, who had been collated parish priest of Achonry, asked for and obtained from the respondent an acre of land on which to build a house; and in 1869 a lease thereof was granted for 61 years, with a covenant 'against assignment to any other than the parish priest of Achonry, without the consent of the lessor. The 5 acres, for which the claim was brought, adjoined this one acre, and was given as a convenience to the claimant, as he alleged, to be held from year to year; but, as the respondent stated, to be surrendered when his incumbency ended.

PIGOT, C.B., held, reversing the Chairman, but on additional evidence, that the claimant held from year to year, and was entitled to compensation. He would, however, only give two years' rent. It must also be remembered that Mr. Maedermot had let his house, and was residing elsewhere, and therefore did not occupy the position of a tenant living on land from which he was disturbed. He declined, under the circumstances, to give the costs of the appeal, as he considered that the landlord had been under the impression that the tenancy determined on the

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\* Sligo Summer Assizes, 1871; before Pigot, C.B.; see Nolan and Kane's *Law of Landlord and Tenant*, p. 23.

claimant ceasing to be parish priest of Achonry, and he considered that the conduct of the landlord in giving a long lease of the land adjoining the holding, to enable a glebe-house to be built, deserving of praise. As a rule, however, the costs should abide the event. He differed from those Chairmen who, he understood, had decided that the fact of a tenant putting forward a much larger claim than he was entitled to, should, of itself, deprive him of costs.

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WARD v. WALKER.\*

*A tenant under a Chancery letting pending the cause is entitled to compensation for improvements from the owner of the land at the termination of the suit.*

Quære—*Whether such an owner is an immediate landlord under sec. 3.*

FITZGERALD, J.—In this appeal two very grave and important questions have been raised, and I think the proper course to adopt is, if either of the parties so desire, to refer them to the Court of Land Cases Reserved. The first question is, whether the respondent is a tenant within the meaning of the third section of the Act of Parliament. The second, whether he has been disturbed by the act of his immediate landlord, within the meaning of the Statute. And there is a third question, in reference to which I entertain no doubt or difficulty, whether if found not to be entitled to compensation for disturbance, he is not entitled in any event to claim for improvements. I am of opinion, and entertain no difficulty in holding that, however the other questions may be decided, he is entitled to compensation for improvements; but I shall, if it be desired, reserve the two other very important questions for the court above, for they are such as most frequently arise in the case where suits are instituted by incumbrancers, and where the owners of estates are minors or lunatics. I do not agree with the Chairman that the case was one in which the maximum of compensation should be given. The maximum compensation should only be given where capricious eviction takes place, or where some act of misconduct has been committed by the landlord—as, for instance, where an improving tenant, paying the best rent to be obtained for the land, is capriciously ejected. Such a tenant would be entitled to the maximum

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\* Wicklow Summer Assizes, 1872; before Fitzgerald, J.

compensation. Here the Court of Chancery, at the instance of an incumbrancer, took possession of the estate of the present landlord's father, and the tenancy was created, not by the landlord, but by the Court of Chancery. No matter how long such a tenancy might last, it must determine with the termination of the suit itself, and when the suit is at an end, all that the landlord has to do is to demand as his right the land, the possession of which has been temporarily withheld from him by the Court of Chancery. The letting for seven years, pending the cause, was liable to be put an end to at any moment by the termination of the suit. There was here no act of the landlord capriciously evicting the tenant; he merely took possession of that which became his when the cause in the Court of Chancery was at an end. There is no question as to the amount of compensation for improvements; and what I propose at present to do is, to settle the compensation for disturbance at the rent at present due, in case the court above shall decide that the tenant is entitled to any. I will reserve the points I have stated for the court above, *if the parties wish*; at the same time I think the case does not come within <sup>the third section of</sup> the Act of Parliament at all. In my opinion the tenancy is not one within the meaning of the section of the statute, and Mr. Walker is not the immediate landlord; but I now pronounce no judgment on this point.

The respondent consented to let the arrears of rent be set-off by the amount fixed for compensation for disturbance; and consequently no case was reserved.

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#### KELLEHER v. JACKSON.\*

*Claim for buildings. No measure of allowance for enjoyment. Principles of construing the Act. Meaning of the word "manure."*

This was a claim at the expiration of a lease for compensation for out-offices and unexhausted manures in the nature of droppings of a number of milch cows, which were for a lengthened period kept upon one of the fields, and were fed on wash and grains. There was a covenant by the lessee not to build "any cabin, house, messuage, or other building, or erect or make any new fences upon any part of the said lands without the consent in writing of the lessor."

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\* Before Pigot, C.B., Cork Spring Assizes, 1871; reported in Nolan and Kane's *Law of Landlord and Tenant in Ireland since 1860*, p. 391.



PIGOT, C.B., intimated that in his opinion he should be obliged to hold that it would be totally inconsistent with the nature of the thing demised, and with the purposes for which it was demised, that the landlord should have the power of preventing the erection of out-offices indispensable for the enjoyment and cultivation of the farm. He was, therefore, disposed to hold that the word "buildings" was to be treated as buildings *ejusdem generis* with the buildings previously erected, and did not comprise such out-offices as in this case compensation had been claimed for.

Every case should be determined on its own merits. The amount of enjoyment of the tenant should depend on the nature of the holding, on the kind of improvement, and the manner in which the enjoyment had been had by the tenant. All these things were capable of almost infinite modifications according to the particular circumstances of each case. He trusted no attempt would ever be made by any Judge to lay down any distinct and specific rule by way of per centage for what was to be allowed to the tenant in any particular case, for, in his opinion, any such attempt would be an attempt, not at exposition, but at legislation, by pronouncing in the shape of a judgment a law that the legislature never enacted.

It was suggested that the fertility which might have been imparted to the land by increased droppings of cattle, ought not to be treated as manure under sec. 70. It had been contended that the use of the term "such like works" after "tillages and manures" restricted the meaning of manure to something applied by manual labour. He was very far from coming to the conclusion that that was the true meaning of the Act of Parliament on this subject. He himself would be disposed to consider the provisions of this Act of Parliament not as lawyers—not as mere technical students or readers would understand it—it ought to be treated as an Act conveying the intentions of the legislature to the class for whose benefit the Act was intended, and its expressions, he thought, ought to be looked into, not with a view of scanning particular phrases or words, or resorting either to a dictionary or to scientific issues, but to take them as the common sense of mankind would understand them—to take them as farmers unskilled in law, but of great experience, would understand the terms the legislature had used. He hoped the tribunals before which such cases might come would pause long before they came to the conclusion that there was to be any restrictive or technical meaning given to the word "manure."

## DEVLIN v. KANE.\*

*A tenancy for a year certain is less than a tenancy from year to year, and the tenant is entitled to compensation.*

The tenant had been in possession for seven or eight years. In October, 1870, under written contract, he took one acre of land, part of the Commons of Bray, at a rent of £8, for one year certain. The tenant took it as a convenience for putting out his manure, and the landlord had the privilege of putting up a board stating it was to be let for building ground. In November, 1871, the land was again let, the tenant refusing to sign the written agreement, but, after getting a rent receipt in advance, on the alleged understanding that he would sign the agreement.

DEASY, B., held that the tenancy was less than a tenancy from year to year; that it was not *bona fide* let for a temporary convenience; and he awarded one and a half year's rent, compensation for disturbance.

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In re SIR C. DOMVILLE.†

*An owner of a subsisting lease who has agreed with his landlord to surrender the lease on being paid a sum as compensation for improvements, is not entitled, under sec. 42, to a charging order.*

W. M. Courtney, the lessee, agreed with Sir C. Domville, his landlord, a limited owner, to surrender his holding and the residue of his lease, upon payment of £3,000, which was the sum agreed upon between them as compensation for improvements. The landlord applied for a charging order under sec. 42 of the Land Act. The Chairman held that the transaction was *bona fide*; that no notice of the application was necessary to be sent to the person entitled to the first estate of inheritance; that the sum applied for was not a "sum due in respect of compensation" under the Act, these words applying to a sum ascertained by the decree of the Court in a dispute between the landlord and tenant, or by arbitration, and so recorded; and that the tenant was not quitting his holding within the meaning of the Act; and he therefore refused the application.

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\* Court for Dublin Land Appeals, 14th May, 1873, before Deasy, B.

† Court for Land Appeals in and for the County of Dublin, 29th Jan., 1873; before Keogh, J., and O'Brien, J.; see 7 IR. L. T. REP., p. 55.

Sir C. Domville appealed.

KEOGH, J. (after reading the 42nd section of the Act), said :—The application in this case was made to the Chairman of Quarter Sessions for the county of Dublin, who appears to have gone into the consideration of this claim, both as to the law and the facts, in a very careful manner. He has gone into an investigation of the amount claimed, but he does not seem to have been satisfied with it. It is conceded that the utmost amount to be given to the tenant is £3,500. The question which we are called upon to decide is whether any sum is due in respect of compensation to the tenant under this Act; and as to his quitting his holding, the fact is, he has not quitted nor is he about to quit his holding, and I am of opinion that he will not do so till he has got the money. It cannot be said that the amount claimed is due. He holds under a lease that will expire on the death of the *cestui que vie*, the Duke of Cambridge. When that takes place he may have a claim to compensation, but that claim would be a shifting claim, for the longer the Duke of Cambridge lives, the less will be the claim; and are we to decide that a thing should be done now which could not be done till after his decease? We are of opinion that the decision of the Chairman is correct, and we affirm it.

O'BRIEN, J., concurred.

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*In re TISDALL'S ESTATE.\**

*Facilities for purchase by tenants of their holdings in the Landed Estates' Court, under secs. 45 & 46.*

Bewley, on behalf of William Dalton, a tenant, who had purchased a lot containing 193 acres odd, applied that a separate conveyance might be made of that portion which was in his own possession, containing 181 acres; and a separate conveyance of the residue which was in the possession of a yearly tenant of the late owner, and that the purchase-money might be apportioned between the two lots, and that, as between them, the entire rent should be charged on the larger lot.

FLANAGAN, J., directed that the rental should be re-settled at the expense of the tenant, so as to make the two lots proposed, and that thereupon the purchase-money should be apportioned, and separate conveyances executed.

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\* Landed Estates' Court, 24th Feb., 1873; before Flanagan, J.

SIR R. LYNCH BLOSSE *v.* NALLY.\*

*Notice to quit an agricultural or pastoral holding must be served for November, whether the tenancy commenced in May or November.*

The plaintiff brought three ejectments for overholding, one in respect of house property in Ballina; the other two in respect of farms. In all the cases the tenancy commenced in May. In the two latter cases the notices to quit were for November; and in the former cases for May.

DEASY, B., held that in the case of holdings within the Land Act, the 58th sec. of the Land Act was imperative in the absence of special agreement to the contrary, that the notices to quit should be served for November, in order to be valid, irrespective of the time of commencement of such tenancies. He also held the notice to quit sufficient in the case of the house premises.

LORD ASHTOWN *v.* LARKE.†

*A notice to quit was served on 26th October, 1870, to determine a May tenancy, requiring the tenant to give up possession on 1st May, 1871, "provided the tenancy originally commenced on the 1st of May, or otherwise at the end of the year of the tenancy which should expire next after the end of half a-year from the date of the notice;" and in Jan., 1872, ejectment was brought for the lands, claiming title from 2nd May, 1871. Held, that the notice was effectual to determine the tenancy on the 1st of Nov., 1871.—(MONAHAN, C. J., diss.)*

LAWSON, J., having stated the facts as above, and having read sec. 58 of the Land Act, proceeded:—The effect of that section is that, unless there be an agreement, which must mean an express contract as distinguished from one arising by implication of law, the yearly tenancy is prolonged to the last gale day of the year, and therefore the tenancy in this particular case did not determine till the 1st of November. It is argued then that this notice is insufficient, because it is served for the 1st of May, on which day the landlord was not entitled to the possession;

\* Mayo Spring Assizes, 1873; before Deasy, B.; 7 IR. L. T. REP., p. 50.

† Com. Pleas, 26th April and 2nd May, 1872; before Monahan, C. J., Morris, J., and Lawson, J.; IR. REP., 6 C. L., 270.

the argument being that, as in fact the tenancy began on the 1st of May, all the rest of the notice is inapplicable and must be rejected; and probably this would be so if you gave a literal construction to this notice, and construed it by the facts which appeared in evidence; but giving it a reasonable construction, is it not a notice to quit on the 1st of May, if that be the day on which the landlord was entitled to the possession, if not on the next gale day, the 1st of November, that being the other gale day, for it cannot be held to mean the 1st of May in the succeeding year? The principle of construction applicable to notices to quit is correctly stated in Furlong's *Landlord and Tenant*, 608:—"The notice must be framed so as not to deceive the tenant; but if the intention of the party serving the notice is manifest, the Court will not suffer it to be vitiated by an obvious mistake, and will endeavour to give it a rational interpretation." Now, I think it impossible that the tenant could have been misled by this notice; he knew that the landlord required possession either on the 1st of May or the 1st of November, according as he was entitled. It is not the law that the landlord is bound to serve his notice to quit for the right day; if it be doubtful which is the right day, he may give his notice for either of two days (*Doe d. Matthewson v. Weightman*, 4 Esp., 5; *Doe d. Williams v. Smith*, 5 Ad. & E. 350). We have been referred to cases to show that the landlord must show accurately in the notice to quit the day on which he is entitled to take possession. I think what these cases (*Doe d. Spicer v. Lea*, 11 East., 312; *Doe d. Mayor of Richmond v. Morphet*, 7 Q. B., 577; *Mills v. Goff*, 14 M. & W., 72; *Kemp v. Derrett*, 3 Camp., 510; *Doe d. Pitcher v. Donovan*, 2 Camp., 78), really show is that the notice to quit is bad if it demands possession on a wrong day. For instance, in *Doe v. Lea*, the notice to quit was for Old Michaelmas, which was a wrong day, instead of New Michaelmas. In *Doe v. Morphet*, the holding was from 11th of November, and it was served on the 21st of October, for the 13th of May, or such other time as the current year would expire. It was held that it was a notice for the ensuing November, that being in the current year, and not for the November in the next year, and was, therefore, too short a notice. In *Page v. Moore* (15 Q. B., 684), the notice was bad because it required the tenant to quit at 12 o'clock at noon, as he was entitled to possession till 12 o'clock at night. These cases show that a notice to quit at a wrong time is bad, but if it be to quit on either of the two days, one of which must be right, it is a good notice.

MORRIS, J., concurred.

MONAHAN, C. J.—I am of opinion that the notice to quit did not determine the tenancy. [His Lordship read sec. 58]. It occurs to me

that the meaning of a notice to quit "taking effect" is determining the tenancy; and that therefore no notice to quit shall determine the tenancy until the last gale day; and that therefore in all cases to which the statute applies, the tenancies from year to year shall for the future be determined by notice to quit on the last gale day, and not as heretofore, on whatever gale day the tenancy originally commenced. If this be the correct view of the statute, the notice to quit in the present case, to be valid, should have required the tenant to quit on the 1st of November, and that a notice to quit on any other day before or after the 1st of November is bad, and not sufficient to determine the tenancy, just as before the recent Act. A notice to quit on the 1st of December, served on the 1st of May, would not be a sufficient notice for the 1st of November. The cases to which we have been referred show that if the notice is to quit on a particular day, the day so named must be the same day on which the landlord is entitled to the possession. This is an absolute notice to quit on the 1st of May then next. What follows in the notice appears to me altogether inapplicable to the present case, as it is on the supposition that the tenancy did not commence on the 1st of May. It is admitted it did, in fact, commence on the 1st of May. The notice is evidently on an old printed form, intended to be used when the tenancy expired on whatever day it commenced, and is not at all applicable to the present case, in which the tenancy determined on the 1st of November, though it commenced on the 1st of May. I therefore consider the case as one in which the tenancy in fact expired on the 1st of November, and the notice to quit being to quit on the 1st of May was bad.

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#### WRIGHT v. TRACEY.\*

*A letting of the grass, with the use of the houses, as a temporary convenience to such letting, for one year certain, held (MONAHAN, C. J., diss.) not to be a tenancy requiring notice to quit under sec. 69.*

The plaintiff, by an agreement dated 8th March, 1871, and signed by the parties, set to the defendant "the grass of part of the lands of Ballynagran, with the use of the dwelling-house and out-offices, and all appurtenances thereunto belonging, as a temporary convenience to such letting, all which premises are now in the possession or occupation of the said Morgan Tracey; and it is hereby agreed

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\* Court of Common Pleas; before Monahan, C. J., Lawson and Morris, JJ.; Feb., 1873.

between the said parties that this letting is, and is to be solely as a pasture farm, and for a dairy and dairy accommodation, and for the term of one year certain, to commence on the 25th day of March next, 1871, and to end on the 25th day of March, 1872. . . . The said Morgan Tracey is to have for tillage the Minister's Hill, free of rent, as a convenience during the said period of tenancy." Possession was given to the defendant under that agreement in December, 1871. Action of ejectment was brought at the last Wicklow Assizes, claiming possession as from 26th March, 1872. Defendant relied on the fact that under sec. 69 of the Land Act, the defendant was entitled to a notice to quit. Fitzgerald, J. directed a verdict for the plaintiff, but reserved liberty to defendant to move to have a non-suit entered, if the Court should be of opinion that the plaintiff ought to be non-suited.

*Held*—(MONAHAN, C. J. *diss.*) that the tenant was not entitled to notice to quit under sec. 69, and that the verdict for the plaintiff should stand.

MONAHAN, C. J., thought the tenancy within sec. 69, as being less than a tenancy from year to year, and that therefore the defendant should have been noticed to quit.

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#### FINNEGAN v. CONLON.\*

*Notice to quit served on a tenant of an agricultural or pastoral holding must be stamped. A holding of an acre and two roods comes within the Act.*

This was an appeal from the dismissal of a Civil Bill ejectment. Mrs. Conlon, the defendant, took an acre and two roods of land from the father of the plaintiff, for which she paid £5 rent. The plaintiff deposed that he became owner three years ago; and that he went to Mrs. Conlon and informed her he would continue her as tenant on condition that her son would work for him as labourer. The son refused latterly to work for plaintiff, and hence the notice to quit, which was unstamped, and the ejectment. The land was occasionally cropped with corn and potatoes.

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\* Armagh Spring Assizes, 1873; before Keogh, J.

KEOGH, J., held that the defendant was tenant from year to year of an agricultural holding, and therefore the notice to quit should have been stamped.

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LITTLE v. JOHNSTONE.\*

*A claimant who had been ejected for non-payment of rent, but who had paid up arrears and costs, and is afterwards served with notice to quit, is entitled to compensation for disturbance.*

In 1859 the claimant took five acres of land at a rent of £3 yearly, and had improved it. The claimant had before the notice to quit been ejected for non-payment of rent; but he had paid up the arrears of rent and costs. Afterwards an ejectment was brought on the determination of the tenancy by notice to quit; and on this the claim arose. The Chairman, while allowing £25 for improvements, gave no compensation for disturbance.

KEOGH, J., held that the claimant was entitled to compensation for disturbance, and allowed the full amount claimed, £15, and £45 10s. for improvements to lands and houses, deducting £12 previously allowed by the landlord in respect of the house, and £4 10s. arrears of rent.

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JOHN MALLIN, appellant, v. EARL OF LEITRIM, respondent.†

*Tenancy from year to year. Temporary accommodation.*

This was an appeal from an ejectment decree for over-holding. The appellant held the lands under a printed agreement, which constituted him tenant from year to year, determinable on six months' notice to quit, and contained elaborate stipulations as to good farming, keeping in repair, and so forth; and at the end there was in writing the following stipulation:—"And it is hereby agreed and understood that this letting is a temporary accommodation to the said John Mallin on account of the infirm and delicate state of health of his mother, who is now over eighty years of age." The question turned entirely upon

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\* Roscommon Summer Assizes, 1871; before Keogh, J.

† Leitrim Spring Assizes, 1873; before Morris, J.



whether this written paragraph constituted Mallin a tenant from year to year, determinable upon the death of his mother, or whether there should be a notice to quit.

*Robinson, Q.C.*, and *Roper*, for respondent, contended that, upon the true construction of the instrument, Mallin was a yearly tenant whose tenancy ceased upon the death of Mrs. Mallin, which occurred in March, 1872, and no notice to quit was necessary.

*H. H. M'Dermot*, for the appellant, contended that the agreement in question made Mallin a yearly tenant, and that a notice to quit was necessary to determine the tenancy.

MORRIS, J., adopted this view, holding that the stipulation was inserted because the appellant's mother was in such delicate health and so old that Lord Leitrim would not give him any longer term than a tenancy from year to year, and reversed the decision of the Court below.

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#### BOLLAND v. DOMVILLE.\*

*A sub-tenant is entitled to claim against his superior landlord, taking up the lands, compensation for the improvements he has made thereon*

This was an appeal from a decree of the Chairman of the County Dublin, for compensation for improvements. The respondent made a lease of the lands in 1820, and the claimant held under a sub-lease made by the respondent's lessee.

DEASY, B., reserved his final judgment, but stated that according to his present opinion the respondent was the landlord within the definition given in the 70th section of the Land Act. The present claim was under the 4th section, in which no mention was made of "immediate landlord," as there was in the 3rd section, where it seemed as if the Legislature thought the compensation for disturbance should be given where there was privity of contract; while in the case of permanent improvements the compensation should be paid by the landlord, who got possession of the lands with the improvements thereon.

His Lordship subsequently stated that he saw no reason to alter his previously expressed opinion, and gave a decree for compensation.

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\* Court for Dublin Land Appeals, 13th May, 1873; before Deasy, B.



## CHAIRMEN'S DECISIONS.

## LYTLE v. NESBITT.\*

*On the expiration of a non-resident middleman's lease, the sub-tenants in occupation, and not the middleman, are entitled to tenant-right.*

This was a case remitted to the Chairman by Monahan, C.J., who had decided that tenant-right obtained at the expiration of the lease, to inquire whether the occupying subtenants or the middleman was entitled to the tenant-right. The claim arose on an ejectment consequent upon the expiration of a lease. The subtenants, twenty in number, had made extensive improvements. The middleman resided in Dublin, and had for a long period enjoyed under the lease a profit rent of £86 a year.

Michael King, Esq., J.P., Mr. Mitchell, sub-agent on the Dawson estate, Mr. Taylor, rent-receiver for the Salters' Company, and others, proved that the benefit of the custom had always been given to the occupying tenants. They were taken into immediate connexion by the head landlord.

The value of the tenant-right had been fixed at £10 an acre in the previous investigation.

The CHAIRMAN held that the sub-tenants had established their claims to the tenant-right, that being the matter of fact under the Ulster custom in that district, as established in evidence; and he dismissed the claim of the middleman.

An appeal was taken on behalf of the middleman; and dismissed (Londonderry Spring Assizes, 1872,) by Keogh, J.

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\* Magherafelt Land Sessions, October, 1871; before J. C. Coffey, Q.C.

## LOUGHRAN AND SMYTH v. MACGEOUGH.\*

*An arbitrary restriction, of modern date, attempted to be annexed to the ancient custom of the estate, and inconsistent therewith, and unreasonable, is not a legal limitation of the custom.*

The CHAIRMAN—Mr. MacGeough alleged that for ten years past the payments for tenant-right were within £5 an acre. It was a condition required by the landlord in giving his consent to a change of tenancy that a receipt should be produced showing that the purchase-money did not exceed this limit. Now there were a great many instances in which transfers took place for less than £5 an acre, and the fact that none of them took place at a higher rate did not appear equally well established, because it was very likely that tenants told the landlord they only gave £5 an acre, when they gave more. It was obvious that an effort had been made by the late Mr. Bond to limit the value of the tenant-right, and this effort was continued by his son, the present respondent. Now, was this a binding rule? If for a great length of time, an established rule had been insisted on by the landlord, and recognized in every instance, or in the majority of instances, and that this limit was adopted into the custom, the custom of tenant-right could not be extended beyond it. In this particular case the rule could not be very ancient, else it would be much better known, and it would be a curious rule to establish in former times, when perhaps there was nothing like £5 given as the usual rate of purchase of tenant-right. Money had changed, and was changing, in value; and a hard and dry rule of this kind would appear to be inconsistent with the nature of the custom, and would, if continued in the future, become most unreasonable and unsatisfactory. Now, did the custom on this estate exist with this limitation? He had evidence of large sums—as much as £20 an acre—given. This showed what the nature of the tenant-right on this estate was, and bore upon the question whether the limitation was derived from former usage, or was a new appendage attempted to be fixed on the custom by the landlord. Such a rule, if it did not interfere with pre-existing rights, might probably be adopted as a portion of the custom. If there was a known custom to put on a fixed sum, and not to go beyond it, then a variation according to the value of money might be adapted to the old established custom. He could not adopt the alleged rule as part of the custom on the estate. No doubt it was a rule as far as the landlord could make it so, but it was not a legal limitation of the custom.

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\* Ballybot L. S., Jan., 1873; before H. H. Hamilton, Q.C.

## GRAHAM v. THE EARL OF ERNE.\*

*Form of dual claim approved of. It is desirable that the ejectment and claim should be heard together. The leaseholders' tenant-right considered. Nature of the Ulster tenant-right.*

The CHAIRMAN.—In this case the claimant lodged a claim in the form which I have hitherto approved, and which, until corrected by the judgment of some higher tribunal, or otherwise directed by the Legislature, I shall continue advisedly to sanction—that is, an alternative claim in the first instance, claiming under the 1st section of the Act the benefit of tenant-right; and then, in the event of the tenant failing to establish that right, seeking the benefit of the 3rd and other sections of the Act. If a tenant believes himself entitled to a tenant-right usage he may, if he likes, abandon it, but I think he is not compelled by the Act either to abandon it or to determine the question of right for himself. I think he is entitled to have the adjudication of the Court on the question whether or not (in the words of sec. 3) “he is entitled to compensation under sections 1 or 2 of the Act.” If the Court should decide against him on the inquiry, then, if he seeks compensation, the only course left him is to claim under section 3, and the other sections of the Act. Whether the claim for tenant-right should be raised in a separate and distinct document, and the claim under the 3rd and the other sections in another distinct document, I consider a mere matter of formal procedure, either course being admissible; and as I consider the union of the two claims in one document—the alternative claim—tends to diminish expense, and to expedite the proceedings, I shall sanction this course of proceeding, until, as I have said, I am corrected, or otherwise directed. The right of the claimant in this case to the benefit of a tenant-right usage was the subject of full investigation at last October Sessions, and having, as I hope, then patiently heard the case on that branch, and having had the assistance of two eminent counsel who appeared for the parties, I then formally adjudicated that the claimant (in the words of section 3) was not entitled to compensation under section 1—*i.e.*, that he failed to prove himself entitled to the benefit of *any* tenant-right custom whatever. The material facts of the case, as established by the oral and documentary evidence, are as follows:—By lease dated 1st November, 1801, the lands in question were demised by a person named Balfour to Francis Graham, the grandfather of the present Francis John Graham, J.P., of Dunngoon, for a term of three lives, at a yearly rent

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\* Enniskillen Land Sessions, 8th Jan., 1873; before P. J. Blake, Q.C.

of £22 15s., late Irish currency. The lessee having died, his interest under the lease came to his grandson and heir-at-law, the above-named Francis John Graham. He being thus entitled to the lessee's interest, and in possession of the land, which, with the exception of tillage for the herd, was then entirely a grass farm, in 1862, in consideration of £270 17s., assigned his interest by an ordinary deed to the present claimant. Prior to the negotiations, or up to the time of the conveyance and actual transfer to the claimant, no intimation whatever, directly or indirectly, had been given by the vendor or the claimant to Lord Erne or his then agent, Mr. John P. Hamilton, about the transaction; and they were not, nor was any one on the part of Lord Erne, communicated with, consulted, or referred to in relation to the purchase or sale. The claimant after the conveyance to him, paid the rent as assignee of the lessee's interest. Early in January, 1871, the last *cestui que vie* died. The claimant continued to hold as under his tenancy down to the last gale day of the year in which the tenancy determined—viz., the 1st Nov., 1871. Soon after that date possession was demanded, and although negotiations were carried on, it was conceded that no new tenancy was created. Prior to and in sufficient time for the Easter Sessions of 1872, an ejectment was brought, and on or soon after the 21st March the claim was served. The ejectment, although served sufficiently to be itself ripe for hearing at the Easter Sessions, was served so short a time before those Sessions as not to leave to the claimant the calendar month prior to the Land Sessions required by the 9th rule. The ejectment came on for hearing at the Easter Sessions, and it then appearing that the fact of the claim not being then ripe for hearing was caused by the dilatoriness of the landlord, as I have frequently done, and shall continue to do under such circumstances, I adjourned the ejectment to Trinity Sessions as I consider it most desirable in all cases that the ejectment and claim should be heard together. On or about 18th May the landlord's dispute was served, and in Trinity Sessions the ejectment and claim came on for hearing together, and on the regular proof being made I gave the ordinary ejectment decree. On the hearing of the claim several witnesses were examined, and it appearing that the claim as framed lacked the precision in stating the custom which it reasonably ought to have, I gave liberty to amend, and at the desire of both parties I again adjourned the hearing of the claim till Michaelmas Sessions. No question was then raised by either party on the form of the claim as amended, or on the dispute, and the case on the first branch—viz., as to the right of the claimant to the benefit of any usage or tenant-right custom whatever, was fully and fairly investigated on the merits. At Trinity Sessions I had called the attention of the professional gentleman acting for the

claimant to the defects in the nature of the evidence then produced by the claimant, and its insufficiency to establish a tenant-right usage or custom as existing on the expiration of the lease. To meet this difficulty the claimant sought a postponement and required the attendance of Lord Erne in person to give evidence as a witness in the case. To exhibit clearly and distinctly the grounds on which I decided against the tenant, it is necessary to state my view on the general nature of those usages or customs. On a former occasion I stated, and further experience makes me now abide by that statement, that, common to all the usages or tenant-right customs, there are five leading features which may be termed the essential attributes, viz. :—

1st. The right or custom in general of yearly tenants, or those deriving through them to continue in undisturbed possession so long as they act properly as tenants and pay their rents.

2nd. The correlative right of the landlord periodically to raise the rent, so as to give him a just, fair, and full participation in the increased value of the land, but not so as to extinguish the tenant's interest by imposing a rack rent.

3rd. The usage or custom of the yearly tenants to sell their interest, if they do not wish to continue in possession, or if they become unable to pay the rent.

4th. The correlative right of the landlord to be consulted, and to exercise a potential voice in the approval or disapproval of the proposed assignee.

5th. The liability of the landlord, if taking land for his own purposes from a tenant, to pay the tenant the fair value of his tenant-right. Those five elements I have found existing in every usage or tenant-right custom that was proved before me; and the special characteristics proved, in relation to the tenant-right recognized on particular estates for the most part had reference either to some limitation or restriction affecting the tenant in the exercise of his right of sale, or to the mode adopted by the landlord for asserting his rights under the 2nd and 4th of the above heads. When, therefore, a claim of tenant-right is made by the tenant, and either its existence, or its nature, or its character is disputed by the landlord, the controversy must be determined by the evidence given on either side. In the case of tenancies from year to year, the investigation, though by no means free from difficulty, is comparatively simple. If, for example, it were proved that evictions rarely ever—and never except under very special circumstances—occurred, but that from time to time, at nearly corresponding intervals of, say, from 20 to 30 years, periodical revisions of the rental of the estate took place, and the changes were accepted by the tenants; or if it were proved that

yearly tenants frequently sold for considerable sums their interests in their farms, either voluntarily or in consequence of the pressure of an ejectment for non-payment of rent, and if the purchaser were accepted by the landlord in lieu of the out-going tenant, all such or similar transactions would in this case, and in favour of yearly tenants, be most cogent—perhaps I should say conclusive—evidence of the existence of a tenant-right usage or custom upon the estate. But as regards lands on the same estate held under lease, such transactions happening during the existence of the lease could not be deemed conclusive, if, indeed, they could be deemed cogent evidence of the existence of a usage or tenant-right custom as regards the lands included in the lease. Such transactions would, as regards lands under lease, be, pending the lease, ambiguous, as they might be referred either to the tenant-right acknowledged, or to the lessee's interest under the lease, over which, during its existence, he could exercise complete control. My experience has strongly impressed upon my mind the extreme difficulty, if not the absolute impossibility, for a lessee, on the expiration of his lease, to give, by means of the previous dealings and transactions on the estate, in relation to lands held under lease, unambiguous and coercive proof of the recognition of tenant-right as affecting lands held under lease upon the expiration of the lease. If on any estate tenant-right is admitted or satisfactorily proved to exist in relation to all the yearly tenancies, an aspect of the question as relating to lands held under lease well worthy of serious consideration presents itself. At some time or other previous to the execution of the lease, the lands demised were, it may fairly be presumed, in the possession of mere yearly tenants, and were, it should be presumed, *prima facie*, then affected by the tenant-right custom then recognized upon the estate as affecting all the yearly tenancies. Would, then, the execution of the first lease executed of any lands previously held under a yearly tenancy *ipso facto* extinguish tenant-right as regards the portion of lands so demised, or only suspend the manifestation of its existence during the continuance of the lease, to be revived on the dropping of the lease; and if the lease so extinguished the tenant-right, would the re-letting of the lands, after the dropping of the lease to yearly tenants, re-establish the tenant-right custom of the estate as regards the lands so demised? If it be held as a problem of law that the execution of a lease utterly extinguished the tenant-right for ever in the lands demised, the solution of the question as regards lands held under lease is free from all difficulty; but unless the principle of law is so established, and if the execution of the lease only suspended during its existence the operation of tenant-right, or if, on the re-letting subsequently to yearly tenants, the custom is re-established, then the question in relation to



demised lands is circumscribed to the narrow point whether or not the person who accepted the lease did not thereby forego, as far as he was, and those claiming through him, were concerned, all benefit of the tenant-right custom. I am not called upon to decide, and I shall not offer any opinion on either of those legal problems—viz., whether a lease extinguishes for ever, in relation to the lands comprised in it, the pre-existing tenant-right, or whether it has even the more limited effect of extinguishing tenant-right so far as the lessee and those deriving under him are concerned. But if the effect and the extent of the operation of the lease either to suspend or destroy wholly as regards the lessee and those claiming through him the tenant-right are to be dealt with, not as a question of law, but of evidence, I confess I almost despair of a satisfactory solution of the difficult question—"Is a lessee on the termination of his lease, entitled to claim the custom?"—because, as I have already said, I do not think unambiguous or coercive evidence can be given on the point. The Legislature possibly may remove the difficulty. If, prior to the Land Act, tenant-right were a legal right in the tenant, incident to his yearly tenancy, and recognized as such by the law, one would have very little hesitation in deciding that the acceptance of the lease put an end to all the pre-existing relations and rights, and created, in point of law, new relations and rights regulated solely by the contracts expressed in the lease. But tenant-right being at that time merely the creation of custom, unrecognized by law, and without any remedy for enforcing it, or any sanction save public opinion, it seems, at least to me, very questionable whether the strict principles of the law should be applied to it. In the present case, except for the straightforward, direct action of Lord Erne himself, I should have been involved in all the embarrassments of those perplexing questions, and subjected to the temptation of escaping from deciding the real question in controversy, the matter essential to the adjustment of tenant-right disputes on the expiration of leases, by adopting the more facile course of riding off, in my decision, on the insufficiency of the evidence to establish the existence of the tenant-right claimed on the estate. Lord Erne came into court; he did not sit there lurching, reserving his evidence for the Assizes; on the contrary, distinctly and without qualification, he admitted the existence of tenant-right as a usage on his estates, and that no distinction existed between yearly tenants and lessees. To have the benefit of the tenant-right each class of tenants was bound by, and should observe the special conditions on which it was conceded, and observing those, the lessee, on the termination of his lease, stood in identically the same position as if he had been a yearly tenant. His lordship proved that to his own knowledge, for the last 25 or 30 years, it had always been a

well-recognized condition of the tenant-right custom upon his estates that intending purchasers or assignees, who desired to secure for themselves recognition as such beyond the terms of their strict legal rights, and to have the benefit of the tenant-right custom, should, in its inception, obtain the sanction of his lordship or his agent to the transaction, or, as his lordship expressed it, carry out the negotiations and arrangements with the privity and approval of the office. That course had not been taken in this case, and it was in evidence, and undisputed, that on the very first occasion after the purchase the claimant went to the office to pay his rent, Mr. Hamilton told him he regretted he had become the purchaser without first having the assent of Lord Erne, and that as he had not observed the conditions of the tenant-right custom recognized on Lord Erne's estate, he would not get the benefit of the custom on the expiration of his lease. In a land case, in relation to Sir Victor Brooke's estate, formerly before me, I laid down the doctrine which, until corrected, I will abide by, and in this case shall act upon—viz., that those special conditions, if of long standing and well-recognized, are just as binding on the particular estate as the five larger and more extensive elements of tenant-right which I have above enumerated as existing generally in all cases of tenant-right. In my opinion the Legislature adopted the word "usages" in the plural number advisedly, so as to include all those possibly minute, but often very important differences in the various tenant-right customs. The duty which the Act imposes on the Court is to enforce on each estate the usage or tenant-right custom which existed as a usage upon it at the time of the passing of the Act. If there were then existing on any estate special conditions, long known and well-recognized, as affecting the custom of the estate, I consider such special conditions part of the custom on the estate, even although evidence should be given from which it might reasonably be inferred that the landlord, availing himself of the voluntary nature of the custom, had engrafted, at comparatively a more recent date, those special conditions on the terms of a pre-existing and more ancient custom; and I should likewise hold this doctrine applicable in favour of the tenant in the case of any change beneficial to him, even though shown to have been made in the ancient custom, if such change existed at the passing of the Act, and was then long known and well-recognized. Acting on these principles, and applying them to the facts of this case, I last Michaelmas stated I should reject the claim for tenant-right, and accordingly I do so now. Having at Michaelmas Sessions closed the case, Mr. Donnell, as counsel for the claimant, requested an adjournment to these Sessions to afford the claimant an opportunity of obtaining evidence on the alternative branch of the claim, and to that application I, with the assent of Lord

Erne, acceded, and at these Sessions the alternative claim was fully investigated, and I have awarded compensation under three heads.

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DEVINE v. HUEY.\*

*The third section is borrowed from the good-will element of the Ulster custom. A non-improving tenant is entitled to compensation.*

The CHAIRMAN :—Though there are no improvements, the claimant is entitled to compensation for disturbance, but not the maximum. Section 3 is borrowed from the good-will element of the Ulster custom ; and the intention of the Act is that a tenant who is evicted should get something in his pocket to get to another farm, or to emigrate with good will in his heart to those he leaves behind. I shall administer this section in the spirit of a “live and let live” landlord, which, as I understand it, was the intention of the legislature. But then there is the element of compensation for loss to be regarded. Considering that the tenant has not been improving, that he has been only fourteen years in occupation, ten of them under a lease, and the rent unchanged, and that the rent was a high rent, I think I am dealing liberally in giving three years’ rent, which will be £27. I will deduct nothing for mesne rates.

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DORAN v. CUMMINS.†

*In-coming payments will affect favourably the claim for compensation. Improvements suitable to the holding are improvements suitable to the farm, as it was let to the claimant.*

*Set-off for selling manure and taking two oat crops disallowed.*

The CHAIRMAN :—When Doran got the land, he paid, with the knowledge of his landlord, a small sum to the out-going tenant for her good will. When a person entering a farm, with the knowledge and consent of the landlord, pays money for it, he is entitled to a fair, just, reasonable, and moderate compensation, should he be put out, to be paid by the landlord or by the person succeeding him. The offices are suitable to the farm, as they were let to Mr. Doran ; and therefore I allow compensation for them. As to the selling of the manure, it is to be remembered, supposing the tenant had put this manure in the ground, he would have had a claim

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\* Strabane L. S., 11th April, 1871 ; before Loftus H. Bland, Q.C. ; 5 IR. L. T., p. 115.

† Lurgan L. S., 19th June, 1871 ; before Hans H. Hamilton, Q.C. ; 5 IR. L. T., p. 145.

for unexhausted manures which he had not now put forward; and therefore I disallow the set-off on this account. I also disallow the set-off for taking two oat crops in succession, for a similar reason—for supposing he had manured this land, he would have had a claim for this unexhausted manure also.

### M'COEY v. RENAGHAN.\*

*Money paid to an out-going tenant who became bankrupt, and for which the in-coming tenant received a dividend in bankruptcy, is not in-coming payments.*

*A tenant of a small holding suffers more from dispossession, and is entitled to a greater number of years' rent, than a larger tenant who in bulk gets considerable compensation.*

The CHAIRMAN:—The claimant became tenant by some dealing with a man named M'Grath, who was then owner of the lands, by lending him £60, for which he was to get £3 interest yearly. M'Grath became insolvent, and claimant got £33 as his dividend out of the £60. The respondent bought the interest of M'Grath in the Court of Bankruptcy, and then proceeded to serve notice to quit, and afterwards ejectment, on the claimant. I hold claimant is a tenant entitled to compensation. With respect to the claim for seven years' rent at £3 a-year, the value of the holding bringing it within the lowest scale in sec. 3, the man suffered by being dispossessed of his dwelling, and by altering his status in life, and is therefore entitled to more years' rent than a man who has a number of acres of land, and gets considerable compensation therefor. I award seven years' rent, £21.

### JAMES AND OTHERS v. EARL OF ROSSE.†

*Where a yearly tenant of a farm, part of an estate on which there exists a practice prohibiting assignment without the landlord's consent, files a petition to be discharged as an insolvent, the vesting of the tenancy in the assignees (electing to take same) under the insolvency, is tantamount to a voluntary act of assignment by the tenant; the landlord is reasonably entitled to refuse to accept the assignees as tenants; and the assignees, under section 13, will not be entitled to compensation for disturbance.*

\* Armagh Land Sessions, 12th January, 1872; before Hans H. Hamilton, Q.C.; 6 IR. L. T. REP., p. 37.

† Parsonstown Land Sessions; before H. P. Jellet, Q.C.; 7 IR. L. T. REP., p. 12.

The CHAIRMAN :—The claimants are the official and trade assignees of James Molloy an insolvent debtor. They claim compensation for disturbance and improvements. Molloy was arrested on 25th May, 1871, at the suit of one Michael Kenny, for a debt of £19 16s. 6d. On 22nd June, 1871, he subscribed and verified his petition for discharge as an insolvent debtor. The farm is returned in the schedule. The schedule states that the insolvent did not appear and was discharged by his detaining creditor. I shall assume that the dealing had not the effect of revesting the farm in the insolvent. The assignees proceeded to sell the farm on 27th January, 1872. This would have been an election on the part of the assignees to accept the tenancy, if under the circumstances it could have passed to them, and would have attracted to it the claim for compensation, which must, I think, be now regarded as a statutable <sup>in</sup> incident annexed to such a tenancy. The landlord's agent noticed the bidders that the purchaser would not be accepted as tenant. The sale notwithstanding proceeded, and Michael Kenny was purchaser at £218. The sale was confirmed by the Court. The landlord refusing to recognize the purchaser as tenant, an order was made on consent, on 15th May, 1872, after the service of the notice to quit, by which the purchaser was discharged, and the purchase-money returned to him, the effect of which was that the interest in the farm was once more placed *in statu quo*. The usage of the estate is that an assignment by the tenant of a yearly holding is in no case allowed; that, if the tenant is unable or unwilling to hold the farm, he surrenders it to the landlord, receiving such compensation as may be arranged; and that the landlord selects the new tenant. Are the claimants entitled to compensation for disturbance? In my opinion they are not. It is not necessary in the view I take to express any opinion whether the section includes the case of assignees *in invitum*, such as purchasers under a sheriff's sale, judgment mortgages, or assignees in bankruptcy when the bankruptcy has arisen from the hostile action of a creditor, or assignees in insolvency where the <sup>debtor</sup> creditor has been made insolvent under sec. 183 of the Bankrupt Act, 1857. There is much to be said in support of each view of this question; but I express no opinion on the point, which is unnecessary to the decision of the present case. These cases all proceed on the maxim, *Lex non cogit ad impossibilia*. The administration of the law, in all its branches, must admit that general exception. The clauses of the Bankrupt Act which enable a creditor to take adverse action as against his debtor, and compel the latter when such action has been taken, to vest all his estate in his assignees, or do it for him, virtually supersede the terms of the contract not to assign without license, in furtherance of the larger policy upon which the Bankrupt Acts are founded, just as occurs

in the parallel case of a compulsory sale to a railway company, under the provisions of the Lands Clauses Act. But this class of cases has no application to the present, in which the insolvent has been made so by his own voluntary act, adopted purely for his own benefit. The vesting in the assignees must, in my opinion, be regarded as having been procured by himself, and as being to all intents and purposes his own act. I am, therefore, of opinion that this was a voluntary assignment by the tenant of his holding, without the consent of the landlord, and not warranted by the practice prevalent upon the estate. I am also of opinion that the refusal of the landlord to accept the official assignees and the creditor's assignee as his tenants was a reasonable refusal. I am, therefore, of opinion on all these grounds, that the claimants have failed to maintain their claim.

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ADAMS v. JONES.\*

*Definition of town-parks and waste land.*

This was a claim for disturbance in the occupation of 10 acres, near Portglenone.

The CHAIRMAN :—Portglenone is little more than a village. It contains only 800 inhabitants. It has a fair, but that would not make land near it "town-parks." But even assuming that Portglenone is a town, I base my judgment on the fact that the holding was not let, enjoyed, or considered as town-parks until Mr. Jones in dealing with his tenants called it town-parks. The tenant may assent to this name, but this will not make it town-parks. The claimant's father got it when it was not in a state or condition fit for town-parks. It was flooded, uneven, marshy, full of bog-timber, and generally unimproved. The rent is, doubtless, above that of ordinary lettings; still the raising the rent and calling the land town-parks will not make it such. I adopt the grounds of Mr. Johnston's decision in *Forsythe v. Darby* (5 Ir. L. T. Rep., 35, and Donnell's *Land Act*, p. 290, 293).

I take the word waste land to be used in the Act in a popular not a strict sense. The land was waste, not indeed utter waste, but requiring a great deal of cultivation to make it fully productive land.

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\* Ballymena Land Sessions, 3rd March, 1871; before J. H. Otway, Q.C.; 5 Ir. L. T., p. 74.

## TALBOT v. DRAPES.\*

*Where the holder of land originally let as a town-park has ceased to reside in the town at the time of the disturbance, the holding loses its character of a town-park under sec. 15.*

The CHAIRMAN :—If at the time the tenant was disturbed he was living in the town, the section would debar him ; but if at the time of disturbance he was living two miles from the town, I hold that he does not come within the section. The claimant took this place as accommodation land when he was in the town, and when he left the town he sublet it to another person who did not reside in the town. I hold he is not excluded by the 15th section.

He claims four years' rent for being put out of possession. Virtually he was not put out of possession, but his own tenant. In the case of a struggling farmer, living by farming, I would give four or five years' rent, but in this case I very much doubt whether I should give anything, the claimant not having been in occupation when the notice to quit was served. However, I will allow him one years' rent.

## HAY v. COOKE.†

*A holding, which derives its value from a villa residence built upon it, is not a holding within sec. 71, and therefore the tenant is not entitled to compensation.*

The holding consisted of  $4\frac{1}{2}$  acres, on which a villa had been erected. It was originally let as a building plot, and the landlord, who erected the villa, let it to the claimant at a rent of £44.

The CHAIRMAN :—I think this Act is only intended to apply to those holdings in the hands of persons whose occupation of them is that of farmers, in the ordinary sense of the word. I do not think this holding comes within the definition in sec. 71.

## BOYD AND OTHERS v. GRAHAM.‡

*Definition of town-parks.*

The CHAIRMAN :—The lands, the subject of these six claims, are

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\* Borris-in-Ossory Land Sessions, 1st April, 1871; before Joshua Clarke, Q.C.; 5 IR. L. T., p. 143.

† Waterford Land Sessions, 8th April, 1871; before B. C. Lloyd, Q.C.; 5 IR. L. T., p. 145.

‡ Belfast Land Sessions, 19th and 20th April, 1871; before J. H. Otway, Q.C.; 5 IR. L. T., p. 102.

situated near Ballyclare, a town of about 1,000 inhabitants. The length of the tenants' occupancy varied from 17 years to 59. It was pleaded the lands were town-parks. There were four ingredients necessary to make them such. The first is that they must be ordinarily termed town-parks; the second, that they must adjoin a city or town; thirdly, they must bear increased value as accommodation land; and fourthly, they must be in the occupation of a person living in the city or town. He took it that these lands were not "ordinarily termed" town-parks, inasmuch as there was no evidence to show that they had been so identified. This part of the definition of town-parks is, of course, a matter of evidence from persons in the vicinity. Again, is it to be said that men who took this land when Ballyclare was very small, 48 years ago, although the land they took was, in fact, a marsh, and a horse could not go on it, could be said to have taken town-parks? They were not to be regarded as town-parks, even though they might be found subsequently useful as accommodation lands. They must have taken it as a farm; they did take it as a farm; they took and cropped and tilled it as such, and some of it was incapable of cropping and tilling. Having come to the conclusion that they were not known as town-parks, the next question was—was the original letting the letting of a town-park. He thought not. It was argued that these claimants had other occupations than that of mere farmers. But the mere fact of a man having a farm, and doing something else of advantage to his family, and which increases his means of livelihood, did not disentitle him to the character of a farmer, or exclude him from the benefits of the Act.

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### O'BRIEN v. REA.\*

#### *Definition of pasture farm under sec. 15, sub-sec. 1.*

The CHAIRMAN :—The meaning of the words "holding let to be used wholly or mainly for purposes of pasture," is that at the time of the letting, the letting must be for the purposes of pasture. It does not apply to a farm which the tenant may use in any way he likes, without any restriction whatsoever.

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\* Tralee Land Sessions, 1st April, 1871; before C. H. Hemphill, Q.C., 5 IR. L. T., p. 86.



## MARTIN v. TRODDEN.\*

*The mere payment of rent by labour does not bring a claimant within the exception in sec. 15, sub-sec. 2, which exempts from compensation "any holding which the tenant holds by reason of his being a hired labourer."*

*Maximum compensation for disturbance awarded to a labourer tenant.*

The CHAIRMAN:—This is a claim made by the tenant, a labourer, against his landlord, for being dispossessed of an acre and three roods of land which was let to him 20 years ago, the rent to be paid in labour. In this state of things we must remember the position of the parties, who are in a very humble sphere of life, having interests suitable to the positions they respectively hold, but which were of that kind which must not be disregarded, although the matter is on a very small scale. The disturbance must be regarded by the claimant as a very material circumstance in his life, and it is only right that he should be allowed some reasonable amount for the change which the removal has brought about. For the permanent improvements, fencing, and draining, I allow £12; for other improvements, £2; and seven years' rent for disturbance.

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*In re* SIR C. DOMVILLE.†

*Application under sec. 42.*

This was an application made by Sir C. Domville, under sec. 42 of the Land Act, for a charging order to enable him to obtain an advance of £3,500 from the Board of Works, to pay for the improvements of his tenant, Mr. Courtenay, who had voluntarily given up possession.

The CHAIRMAN:—No notice need be served on the remainderman. I hold that a sum is not due "in respect of compensation," under that section, until it has been ascertained by a hostile proceeding, either in Court or before the Court of Arbitration, and that settlement of the dispute between the parties, as in this case by agreement, is not sufficient.

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\* Armagh Land Sessions, 12th January, 1872; before Hans H. Hamilton, Q.C.; 6 IR. L. T. REP., p. 37.

† Kilmainham Land Sessions; before the Hon. C. Trench; 6 IR. L. T. REP., p. 157.



## STATUTES.

*Amending the Land Act of 1870.*

34 &amp; 35 VICT., CAP. XCII.

AN ACT TO AMEND THE LANDLORD AND TENANT  
(Ireland) Act, 1870. [21st August, 1871.]

WHEREAS doubts have been entertained whether rights secured by the Landlord and Tenant (Ireland) Act, 1870, to tenants in Ireland may not be endangered by the omission to specify or refer to such rights in conveyances, assignments, and declarations of title executed after the passing of the said Act by the Judges of the Landed Estates' Court in Ireland.

Be it declared and enacted, &c. : . . .

1. In every case in which a sale, conveyance, or declaration of title has been or shall be made, under the provisions of the Act twenty-first and twenty-second Victoria, chapter seventy-two, intituled "An Act to facilitate the sale and transfer of Land in Ireland," subject to any tenancy, the tenant and those claiming under him shall have all rights which are declared to be legal, or to which he or they is or are or may become entitled in respect of such tenancy under the first part of the Landlord and Tenant (Ireland) Act, 1870, and the sale, conveyance, or declaration shall be subject to all such rights, although such rights may not be specified or referred to in the conveyance or assignment executed or declaration signed by the Judge of the Landed Estates' Court; and the word "tenant" shall in this Act have the same meaning as that assigned to it in section seventy of the Landlord and Tenant (Ireland) Act, 1870. Nothing in this Act contained shall in any manner impair or affect the provisions of "The Landlord and Tenant (Ireland) Act, 1870."

Saving certain rights of tenants under Act 33 & 34 Vict. c. 46.

## 35 &amp; 36 VICT., CAP. XXXII.

AN ACT TO EXPLAIN AND AMEND THE LANDLORD AND  
TENANT (Ireland) ACT, 1870, SO FAR AS RELATES  
TO THE PURCHASE BY TENANTS OF THEIR HOLD-  
INGS. \* [18th July, 1872.]

WHEREAS it is expedient to amend the Landlord  
and Tenant (Ireland) Act, 1870, in this Act called  
“the principal Act,” so far as relates to the purchase  
by tenants of their holdings :

Be it enacted, &c. :

Regulations  
with respect  
to purchase  
of their  
holdings  
by tenants.

1. The following regulations shall be enacted with  
respect to purchases of their holdings by tenants :

- (1.) Every application under the principal Act made  
by a tenant to the Board for an advance for the  
purchase of his holding may be made before or  
after such tenant has entered into any agreement  
for the purchase or has been declared the pur-  
chaser of the holding in respect of which such  
advance is required, and the Board may agree  
to advance to such tenant any sum not exceeding  
two-third parts of the value of such holding as  
assessed by the Board :
- (2.) Where any sale of his holding is made to a  
tenant in pursuance of the principal Act, by or  
through the medium of the Landed Estates’  
Court, that Court and not the Civil Bill Court,  
shall have power to charge the annuity autho-  
rized to be charged by the principal Act, in  
favour of the Board, in respect of advances by  
the Board; and the forty-fourth and forty-  
seventh sections of the principal Act shall be  
amended accordingly by the substitution therein  
of the expression “Landed Estates’ Court” for  
the expression “Civil Bill Court :”
- (3.) Notwithstanding the sale to a tenant by his  
landlord of his holding may not have been made  
in or through the medium of the Landed Estates’  
Court, the Board may, if satisfied of the value

of the security, agree to advance to such tenant for the purpose of purchasing his holding any sum not exceeding two-third parts of the value of such holding, as assessed by the Board, and may take as security for the repayment of such advance a charge on such holding of an annuity of the same duration and amount as would have been charged thereon if the sale had been made in the Landed Estates' Court; but no such advance shall be actually paid to the tenant until the Board are satisfied with the title of the tenant, and have taken from him a charge on the holding in such form and with such powers of sale and covenants for payment as the Board may be advised will effectually secure the annuity charged in their favour, and with the like powers for the recovery of such annuity as are contained in the principal Act in respect to the recovery of annuities under the said Act:

- (4.) If while any holding is charged with the payment of an annuity to the Board under the principal Act and this Act, any part of such holding is let to agricultural labourers *bonâ fide* required for the cultivation of such holding, for cottages or gardens not exceeding half an acre in each case, such letting shall not be deemed to be nor shall the same be a cause of forfeiture.

2. In every case in which an advance shall be made after the passing of this Act for the purchase of a holding under the provisions of this or the principal Act, notwithstanding the provisions as to forfeiture in the said principal Act contained, the Board shall have power to sell the holding or any part thereof, and to convey the same to a purchaser, in the event of such holding, or any part thereof, having been alienated, assigned, subdivided, or sublet without the consent of the Board while any portion of the annuity remained unpaid; and the Board may sell the said holding, or any part thereof, by public auction, due notice being

In certain cases where advances made for purchase of a holding, notwithstanding forfeiture, Board may proceed to a sale.

given by the Board of the time, place, terms, and conditions of such sale; and the Board shall apply the proceeds derived from such sale in the first instance to the payment of all moneys due on foot of such annuity, and in redemption of so much of the said annuity as shall at the time of such sale remain charged on said holding, and of all costs and expenses incurred by the said Board in relation to such sale, or otherwise in respect of such holding, and shall pay the balance to the person entitled by law to receive the same.

Short title  
and con-  
struction of  
Act.

3. This Act shall be construed as one with the principal Act, and may be cited for all purposes as The Landlord and Tenant (Ireland) Act, 1872.

# ADDITIONAL JUDGES' RULES.

## SCHEDULE OF COSTS AND FEES.

*The Landlord and Tenant (Ireland) Act, 1870.*

33 & 34 VIC., CAP. 46.

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*Saturday, June 1, 1872.*

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It is this day ordered by the Court for Land Cases Reserved that the following Rules shall be added to the Rules of the 24th of October, 1870, for proceedings under Part I. of the Landlord and Tenant (Ireland) Act, 1870 :—

1. That no case pending in the Chairman's Court, Court of Assize, or Court for Land Cases Reserved, shall abate or be suspended by the death of any of the parties thereto.

2. That in case of the death of any such party, the Court in which such cause is or shall be pending may direct such notice to be given to such person or persons, or deem any notice or notices that may have been given to any person or persons to be sufficient, and may make such order for the further proceedings in the cause as to such Court shall seem fit; and such Court shall be at liberty to proceed with and hear and determine the cause as if no such death had taken place, and may, if necessary, hear and determine the cause *ex parte*.

3. That schedule A of fees annexed to the said rules of the 24th of October, 1870, and referred to in the 24th of said rules, be and is hereby annulled.

4. That the schedule of costs and fees to these rules annexed be substituted for said schedule A, and that the said rule 24 shall be read and interpreted as applicable to the schedule of costs and fees to these rules annexed.

33 & 34 VIC., CAP. 46.

## THE LANDLORD & TENANT (IRELAND) ACT, 1870.

### SCHEDULE OF COSTS AND FEES SETTLED UNDER THE 31ST SECTION OF ABOVE ACT.

*Costs and Fees of Proceedings in respect of Claims and Disputes under  
Sections 16 to 24 (inclusive) of the said Act.*

#### CLAIMANT'S COSTS.

	£	s.	d.
Fees to be allowed for counsel not to exceed the following scale:—			
To counsel, where sum decreed shall not exceed £50,	1	1	0
Do. where sum decreed shall exceed £50 and not exceed £100,	2	2	0
Do. where sum decreed shall exceed £100 and not £300,	3	3	0
In all cases where sum decreed shall exceed £300,	5	5	0

#### RESPONDENT'S COSTS.

To counsel, where sum claimed shall not exceed £100,	1	1	0
Where same shall exceed £100 and not exceed £200,	2	2	0
Where same shall exceed £200 and not exceed £400,	3	3	0
Where same shall exceed £400,	5	5	0

The same fees on appeals from Chairman.

Fees to counsel in costs, between solicitor and client, to be regulated by the sum claimed, according to the scale for respondent's costs.



	£	s.	d.
To the claimant's attorney, attending, taking instructions in all land cases, reading over deeds, leases, wills, or other documents, where the sum decreed shall not exceed £50, .	0	6	8
When the sum decreed shall exceed £50 and not exceed £100, .	0	13	4
When the sum decreed shall exceed £100, . . . . .	1	0	0
Drafting and engrossing notice of claim or dispute and schedules thereto, when sum decreed does not exceed £50, .	0	3	4
When the sum decreed shall exceed £50 and not exceed £100, . . . . .	0	6	8
When the sum decreed shall exceed £100, . . . . .	0	13	4
For the first copy thereof, . . . . .	0	2	6
For every other copy lodged, served, or posted, . . . . .	0	1	0
Advising the proof, examining witnesses, noting evidence, extracting and noting deeds, wills, leases, or other necessary documents, and preparing for the hearing, when the sum decreed shall not exceed £50, . . . . .	0	6	8
When the sum decreed shall exceed £50 but shall not exceed £100, . . . . .	0	13	4
When the sum decreed shall exceed £100, . . . . .	1	0	0
Attending the hearing and conducting the case, when the sum decreed shall not exceed £100, . . . . .	1	1	0
When the sum decreed shall exceed £100, . . . . .	2	2	0
Attending to obtain consent to act as guardian <i>ad litem</i> , and drawing consent therefor, . . . . .	0	6	8
Drafting and engrossing any decree, dismiss, order, or award with necessary recitals, and attending Chairman for approval and for his signature, . . . . .	0	6	8
Brief instructions for counsel and attending him, when sum decreed does not exceed £50, . . . . .	0	6	8
When sum decreed exceeds £50 but not £100, . . . . .	0	13	4
When sum decreed exceeds £100 and not £300, . . . . .	1	0	0
Briefs for counsel of necessary documents, one shilling per sheet of 6 folios, but in no case to exceed 12 sheets.			
Attendance to lodge notice of claim or dispute with clerk of peace, . . . . .	0	3	4
Service of notice to claim or dispute within the county, to civil bill officer for each service, . . . . .	0	1	0
When served out of the county, such sum as the Chairman may consider reasonable.			
Attending to lodge claim with clerk of peace, and entering cause for hearing, . . . . .	0	3	4

	£	s.	d.
Notice for hearing and copy for service, . . . . .	0	2	6
Fee to civil bill officer for service, . . . . .	0	1	0
Instructions to prepare agreement, settling dispute, drawing and engrossing same, attending parties witnessing execu- tion, . . . . .	1	1	0
Duplicate copy agreement for lodgment, . . . . .	0	2	6
Attending clerk of peace to record same, . . . . .	0	3	4
Notice of withdrawal of claim, copy for lodgment with clerk of peace, and copies for service, . . . . .	0	2	6
Attendance on clerk of peace to record notice, . . . . .	0	3	4
Attendance on clerk of peace for docket of deposit of com- pensation money, and afterwards at bank lodging same, . .	0	6	8
Fee to clerk of peace on docket, . . . . .	0	2	0
Notice of appeal and copy, . . . . .	0	2	6
Service by civil bill officer, . . . . .	0	1	0
Copy for clerk of the peace, . . . . .	0	1	0
Attending to lodge, . . . . .	0	3	4
Submission to arbitration and attending execution by parties,	0	6	8
Affidavit verifying signatures and attendance to file, . .	0	3	4
For all proceedings in Arbitration Court, like charges, as in cases before Chairman.			
Notice of application to record award, . . . . .	0	2	6
Service by civil bill officer, . . . . .	0	1	0
Attendance to enter with clerk of peace, . . . . .	0	3	4
Fees on hearing, same as in cases of disputed claims.			
Drawing costs between party and party, and attending Chair- man for taxation, . . . . .	0	3	4
Postal fees, as paid.			

*Costs and Fees on Appeals from Chairman.*

Costs and fees to be allowed on the same scale, so far as the same may be applicable, and to be taxed by the clerk of the peace under the direction of the judge.

RESPONDENT'S COSTS.

To respondent's attorney, like fees and costs in all cases, with this distinction, that his fees and costs are to be regulated by the sum claimed, and not by the amount decreed.

*Fees and Costs of Registration of Improvements  
under section 6.*

£ s. d.

Notice of intention to register with schedule of improvements, copies thereof, services, and attendance, to lodge with clerk of peace, same fees as in cases of claims for compensation.

Requisition for search, attendance on clerk of peace to lodge requisition for search, and for certificate of search, . . . . .

0 3 4

Clerk of peace for search, . . . . .

0 2 0

In case a dispute arises on a claim to register improvements, then the costs of the proceedings in the Chairman's Court to be in the discretion of the Chairman, who shall be at liberty to award to either party a sum for costs, to be paid by his opponent, but not exceeding . . . . .

10 0 0

and

In case of appeals from orders made under section 6 of the Act, the costs of the appeal to be in like manner in the discretion of the judge, and subject to a like limit of . . . . .

10 0 0

**LIMITED OWNERS.**

Application for an order to charge a holding under section 27 of the Act.

Costs to be in the discretion of the Court, and (if allowed), to be on the scale of costs, as in the cases of disputed claims.

In all proceedings for confirmation of agricultural leases under the 28th section, the costs of resisting the confirmation to be in the discretion of the Court, and if allowed, not to exceed . . . . .

10 0 0

*Court for Land Cases Reserved.*

The costs and fees on cases reserved to be in the discretion of the Court, and to be allowed on same scale as in an ordinary law argument in one of the Superior Courts of Common Law, and to be taxed by the taxing officers of said Courts accordingly.

O'HAGAN, *C.*

J. WHITESIDE, *C.J.*

JAMES H. MONAHAN.

HEDGES EYRE CHATTERTON, *V.C.I.*

JAMES O'BRIEN.

J. D. FITZGERALD.

R. DEASY.

M. MORRIS.

JAMES A. LAWSON.

CHARLES R. BARRY.

# JUDGES' RULES

FOR

## REGISTRATION OF IMPROVEMENTS.

COURT FOR LAND CASES RESERVED.

*Saturday, 15th day of February, 1873.*

GENERAL ORDER.

It is this day ordered by the Court for Land Cases Reserved that the following shall be the rules for proceedings under the 6th section of the Landlord and Tenant Act (Ireland), 1870.

The service of notice of intention by a landlord or tenant to register improvements under the 6th section of the Act, together with a copy of the schedule specifying such improvements, shall be effected in such manner (except as to the time of service) as now by law required for ordinary civil bill processes, but may be effected by others than the process servers of the Court, where the service is to be made without the county.

In case the landlord or tenant receiving such notice shall not serve notice disputing the claim made by the schedule within one month after such receipt, the person claiming shall be at liberty to file in the Landed Estates' Court such schedule of improvements (duly verified by the affidavit of the person claiming), on proof of the due service thereof, by statutory declaration of the process server, or other person effecting such service, and on production of the certificate of the clerk of the peace that no notice of dispute has been filed pursuant to the 17th rule of 29th October, 1870, and in case of dispute, and that the Chairman shall allow all or part of said schedule, then the person claiming shall cause to be filed the said schedule in its original or amended form, together with the order of the Chairman allowing or amending the same.

That all such schedules to be filed shall be written on parchment, of the same size as conveyances of the said Court, bookwise, with a margin for binding, and shall be in the form hereto annexed, and shall be entered in the books of index, to be kept for that purpose in the Landed Estates' Court, in the names of the lands and of the owners and tenants whose estates are to be affected thereby.

O'HAGAN, C.

EDWARD SULLIVAN, M.R.

HEDGES EYRE CHATTERTON, V.C.I. R. DEASY.

C. R. BARRY.

County of \_\_\_\_\_

Division of \_\_\_\_\_

A \_\_\_\_\_ B \_\_\_\_\_, Tenant of the Lands of \_\_\_\_\_  
in the Barony of \_\_\_\_\_, *Claimant.*

C \_\_\_\_\_ D \_\_\_\_\_, Landlord of the above named  
Tenant in respect of said Lands, *Respondent.*

IN THE LANDED ESTATES' COURT.

"Landlord and Tenant (Ireland) Act, 1870."

SCHEDULE OF IMPROVEMENTS made by Claimant or his  
Predecessors in Title.

Date of Improvement	Ordinance Name of Townland, Barony, and County	Name of Owner	By whom Improvement effected	Description of Improvement	Amount claimed

## HEARSAY EVIDENCE OF CUSTOM.

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IN connexion with the legalization of the Ulster custom, no subject is more important than the limitations according to English law of the rule which excludes, with few exceptions, all forms of hearsay\* evidence. The rule itself is peculiar to England. "The laws of other countries are quite different; they admit evidence of hearsay without scruple."† The difference, as Lord Mansfield points out, is founded in reason. "In Scotland and most of the Continental states, the Judges determine upon the facts in dispute as well as upon the law; and think there is no danger in their listening to evidence of hearsay, because when they come to consider of their judgment on the merits of the case, they can trust themselves entirely to disregard the hearsay evidence, or to give it any little weight which it may seem to deserve. But in England, where the jury are the sole judges of the fact, hearsay evidence is properly excluded, because no man can tell what effect it may have upon their minds."‡ The existence of the Ulster custom in reference to a holding, the subject of claim under the Land Act, is a matter of fact, to be determined by the Judges alone. In English law courts questions of fact as to ancient custom and modern usage are determined by juries alone. Hence, at the very least, the rule of evidence in question should not be more strictly adhered to in an Ulster Land Court than in an English Nisi Prius Court.

Hearsay evidence is naturally regarded with suspicion. "Evidence of reputation," says Baron Graham, "is in its nature loose and liable to error; and it has been occasionally found to be, in

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- \* The term is used with reference to what is done or written, as well as to what is spoken.

† *Per* Mansfield, C.J., in the *Berkeley Peerage Case*, 4 Camp., 415.

‡ *Ibid.*

particular cases, somewhat unsatisfactory; but it is sometimes of the utmost importance to parties, for it is often the sole support of many important rights, as in copyhold interests." \*

The law of England has carefully cherished all customary rights; and in their desire to protect them, they have engrafted many exceptions, founded on reason and common sense, upon the strict rules of evidence. Cases of custom involve remote inquiries; and "when an inquiry is carried back to a remote period, the dearth of evidence naturally leads the Court, from its desire of ascertaining the truth, rather to let in than to exclude what is offered." †

The Ulster tenant-right has heretofore been outside the pale of the law; but its legalization has made its protection the sacred duty of the judges. Though recently legalized, it is of old date. Its history stretches far beyond living memory. In the period in which it has prevailed, it has become intertwined with every form of social transaction. What Lord Hardwicke said of a *modus* extending over several parishes, indicates the light in which this custom, extending over a whole province, is to be regarded and dealt with. "The Court," he says, "ought not, especially in cases of very extensive consequence, lightly to overturn and overthrow customary payments that have prevailed for a great tract of years." ‡ "I agree," says Sir T. Plumer, "that we ought to be very careful in disturbing an ancient usage, for parties act and purchases are made upon the faith of the *modus*, and all the property in the parish is governed by the subsisting rule which has been suffered to prevail." § It will be seen how far, yet how reasonably, the rules of evidence have been stretched, in order to protect customary rights. It may be said, those English customs are of immemorial existence, which the Ulster custom is not. But the immemorial existence of the English custom was a judicial fiction; and in fact, if not in law, the Ulster custom can lay claim to an existence as long as many of the customs which have been declared immemorial. And it was not because the English customs were supposed to date from the reign of Richard I., but because they dated from beyond

\* *Moseley v. Davies*, 11 Price, 177.

† *Per* Sir T. Plumer in *Short v. Lee*, 2 Jac. & W., 488.

‡ *Chapman v. Smith*, 2 Ves. Sen., 510.

§ *Short v. Lee*, 2 Jac. & W., 487.



living memory, that they were dealt with as they were in the Courts. The reasons of these rules of evidence by which the English customs have been protected and preserved, extend, it will be found, in as full a measure to the Ulster custom.

*Classes of Cases in which Hearsay is admissible.*

The cases in which the rule rejecting hearsay evidence has been relaxed, Taylor divides into six classes:—"First, those relating to matters of public and general interest;—secondly, those relating to pedigree;—thirdly, those relating to ancient possession;—fourthly, declarations against interest;—fifthly, declarations in the course of office or business;—and lastly, dying declarations."\*

*Hearsay in Matters of Public or General Interest.*

"The probable want of competent knowledge in the declarants," says Taylor, "the reason generally assigned for rejecting evidence of reputation or common fame, in matters of mere private right. It may not on all occasions be an easy matter to distinguish between public and private rights. Still, the general rule of law cannot be disputed; namely, that if the matter in question be of a public or general nature, that is, if it be interesting to the community at large, or even to a comparatively small portion of the community, such, for example, as the inhabitants of a parish, a town, or a manor, it falls within the exception by which evidence of reputation is admitted."† Such evidence has been always admitted where the question related to the existence of a manor,‡ to a manorial custom,§ to a parochial or other district modus, and to a vast variety of similar public or general rights. "A modus is, strictly speaking, a private right, but it has been considered as public, so far as regards the admissibility of this species of evidence, because it affects a large number of occupiers within a district."|| It is perfectly clear that on the above principles such evidence is

\* Taylor, sec. 543.

† Taylor, *Law of Evidence*, sec. 551.

‡ *Curzon v. Lomax*, 5 Esp., 60; *Steel v. Prickett*, 2 Stark, R., 466.

§ *Roe v. Parker*, 5 T. R., 26; *Doe v. Sisson*, 12 East., 62.

|| *Per Dampier, J.*, in *Weeks v. Sparke*, 1 M. & S., 679.

admissible in questions relating to the general tenant-right custom of Ulster, or to its particular varieties in districts or estates—questions which are of general interest, certainly interesting to large sections of the community, and which involve the common rights of the farmers in each district or estate. Not unfrequently too the origin of the right claimed is of so ancient a date, and the right itself of so undefined and general a character, that direct proof of its existence and nature cannot be obtained, and ought not to be required.

*Reasons of its admissibility.*

The admissibility of hearsay evidence respecting matters of public and general interest is stated to rest on the following, among other grounds:—"That the origin of the rights claimed is usually of so ancient a date, and the rights themselves are of so undefined and general a character, that direct proof of their existence and nature can seldom be obtained, and ought not to be required; that as common rights are naturally talked of in public, and as the nature of such rights excludes the possibility of individual bias, what is dropped in conversation respecting them may be presumed to be true; and that the general interest which belongs to the subject would lead to immediate contradiction from others, if the statements proved were false." \*

Now what is the rule as to the admissibility of evidence of reputation in these questions of general right? Chief Justice Kenyon states it in *Roe v. Parker*. There, in proof of a custom of descent contrary to the common law, the presentment of the homage (jury of tenants of the manor) of the court baron, found upon inquiry, without stating any instances in support of it, was admitted as evidence.† It was objected that it was nothing more than the opinions of the persons assembled, concerning what was the custom, reduced to writing, and therefore mere reputation without instances to show that the custom had been put in use. "The presentment of the homage was the mere opinion of those men founded in part only upon known instances; from which it is fair to infer that no

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\* Taylor, sec. 544.

† *Roe v. Parker*, 5 T. R., 26.

instances were known to support their opinion on the other parts of it."\* The Court held that "to admit the objection would shake one of the fundamental rules of the law. Nearly a century and a-half ago the homage, being convened to ascertain those rights which were their own in common with the rest of the tenants, and being possessed of all that information which either tradition or their own personal observation could furnish, proceeded to describe the several customs. That this was admissible cannot be doubted, for *tradition and the received opinion are the evidence of the lex loci*. A distinction indeed prevails between a prescription as applied to a particular tenement, and a custom affecting a whole district. And the latter has gone so far that the custom of one manor has been given in evidence to show the custom of another, where they are both governed by the Border Law. Now here was full proof of a tradition respecting the custom of descent in this manor: it was the solemn opinion of twenty-four homagers, delivered on an occasion when they were discussing the interests of all the tenants of the manor."

In the same case, another judge said:—"The consequences of not receiving evidence of this kind would be inconvenient to all the tenants of manors; for some of the instances of descent according to the custom very rarely happen; and if no instance were to happen in the memory of man, and the court rolls were to be lost, the custom itself would be entirely destroyed."

Let us apply the reason of this decision to a case under the Ulster custom. A large estate has been held under long leases, which now drop. No instance of the custom on the estate can possibly be proved by living testimony. If evidence "of reputation and the received opinion," evidence of the custom on the adjoining estate in similar cases were to be rejected, "the custom itself would be entirely destroyed." And surely, in all reason, the sworn testimony of a former landlord of the estate, now deceased, recorded in the Devon Commission,† would be as satisfactory evidence as the presentment of the homage of a court baron.

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\* *Ibid.*, p. 30.

† See *Williamson v. Hutton*, 9 Price, 188; *Donnison v. Elsley*, 1 M'Clel. & Y., 1, where a similar record, the minister's accounts of 23 Hen. VIII., of the possessions of the religious houses, were given in evidence on a question of modus.

In *Doe d. Foster and another v. Sisson*, 12 East., 62, there was an instance recorded on the rolls, proving a custom in favour of a descent to the eldest sister in exclusion of the others; another entry proving a custom in favour of the eldest daughter; and a third extending the custom to a nephew, and an aged witness proved that the reputation of the custom was in default of sons, in favour of the eldest daughter and eldest sister respectively, and their respective descendants, and the learned judge at the trial thought it was admissible evidence for the jury to decide whether the custom extended to a great nephew. Plaintiff's counsel elected to be non-suited, intending to take the opinion of the Court whether, as no instance was in fact proved of a customary descent to a collateral representative so far removed as a great nephew from the person last seized, but only of a descent to a sister's son, the custom could be extended so far by the general evidence given in the case. And on argument, the Court held that the reputation was evidence to go to the jury of the larger custom, and observed that if the lessors of the plaintiff had evidence to contradict the reputation, they might bring the question forward again in another ejectment.

*Persons from whom Hearsay Evidence is receivable.*

From whom is hearsay evidence receivable? "If a dispute were to arise respecting the existence of a local custom, in which all the tenants of a manor were interested, evidence of reputation would be admissible, not only from any deceased tenant, but from any deceased resident within the manor; for it might fairly be presumed that the residents, being persons conversant with the neighbourhood, would be acquainted with the local customs."\* Actual inhabitancy is, however, unnecessary, if the declarant has otherwise sufficient connexion with the subject in dispute.†

It has been held‡ on a question of a parochial modus, that the testimony of a witness who stated that "he had heard old persons who at the time occupied lands in the parish, and were long since

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\* Taylor, *Evidence*, sec 545.

† *Duke of Newcastle v. Hundred of Broxtowe*, 1 Nev. & M., 601; see *Crease v. Barrett*, 1 C. M. & R., 919.

‡ *Moseley v. Davies*, 11 Price, 162.

dead, say that it had always been the custom" to make the payments constituting the alleged *modus*, was admissible evidence of reputation, against an objection taken of interest in making the declaration on the part of the persons from whom the information proceeded. Chief Baron Richards, in giving judgment in this case, said:—"Suppose a stranger should state as a witness that he had long ago heard in the vestry-room a conversation respecting the origin of a given custom, between the clergyman and some of his parishioners, wherein the parishioners, some of whom were since dead, asserted the ancient existence of a custom which it was the interest of the parish to maintain, and that the origin was not membered or known in the parish, and that the clergyman did not say anything to controvert it, surely that circumstance would be admissible evidence to prove that such a custom existed; and if such evidence were to be rejected because the witness could not state the names of the persons who made the assertion, or because they might be or actually were interested in the question, there could be no evidence of general reputation given in any case."\*

The weight to be attached to hearsay evidence must necessarily vary with its character. Lord Ellenborough has observed that it is, in general, weak evidence;† but Baron Wood in a subsequent case‡ expressly dissented from this opinion, and said that upon questions of *moduses* reputation was entitled to great weight, and Chief Baron Richards has spoken of reputation as having great weight and effect.§

### *Forms of Hearsay Evidence.*

The cases cited show that oral declarations are not the sole medium of proving traditional reputation in matters of public and general interest. Old deeds or other old documents, even of a private nature, copies of court rolls, presentments in manor courts, depositions of conventional tenants of a manor, taken in an authorized inquiry, and public records, are admissible evidence of reputation.

\* *Ibid.*, p. 176.

† *Weeks v. Sparke*, 1 M. & S., 686.

‡ *Robinson v. Williamson*, 9 Price, 136.

§ *Moseley v. Davies*, 11 Price, 162.

*Proof from a single instance.*

A single instance will, under some circumstances, be sufficient evidence to prove a custom. Thus, in *Roe d. Bennett v. Jefferey*, 2 M. & Sel., 92, only one recorded surrender in fee by a tenant in tail of a copyhold estate was admitted as evidence to prove a custom to bar entails by surrender, although there was an instance of recovery on the same manor. \*

Such is the regard for custom in England—so tenaciously are ancient rights conserved—that proof apparently slight, and which in other cases would be rejected as quite insufficient, is held not merely admissible, but conclusive, where questions of general interest are concerned. Nor should the Ulster custom of tenant-right, involving the interests of a whole province, and a money property valued variously at from £20,000,000 to £40,000,000, be treated with less scrupulous care, or be protected less generously. The fact that the Legislature stepped out of its way to legalize this so-called anomalous custom, marks it out for not less than ordinary regard. The latest of adoption, it has been received into the family from which it had been so long excluded, not as a monster, to be spurned and crushed out of existence as speedily as possible, but as a favourite, to be protected and cherished. It is not unusual in international treaty-making for one nation to admit the products of another on the terms of the most favoured nation. May we not say that the Legislature intended, in its special legalization of the Ulster tenant-right, to place this Irish custom on the same footing as the most favoured of English customs?

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\* See *Doe d. Mason v. Mason*, 3 Wils., 68.

## EVIDENCE OF CUSTOM FROM OTHER ESTATES.

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To prove the custom on an estate, may the customs of other estates be given in evidence?

“No rule,” says Taylor, “is better established than that which precludes the customs of one manor from being given in evidence to prove the customs of another. Still, such customs become evidence the moment that a foundation has been laid for their admission by clear proof of a sufficient connexion between the two manors. The mere fact, indeed, that the two lie within the same parish and leet, will not be sufficient; nor even that the one was a sub-infeudation of the other; at least, unless it be clearly shown that they were separated after the time of legal memory, since otherwise they may have had different immemorial customs. If, however, it can be satisfactorily proved that the customs in the two manors are identical, or that the one was derived from the other after the time of Richard the First, then the customs of each will respectively become evidence; and so, also, if the customs in question be a particular incident of the general tenure which is proved to be common to the two manors, evidence may be given of what the custom of the one is, as to that tenure, for the purpose of showing what is the custom of the other as to the same. For instance, prove in a particular manor that borough English or gavelkind prevails, and then you may see from other manors what are the peculiarities of these tenures. The manor on the border between England and Scotland, and those in the mining districts of Derbyshire and Cornwall, will furnish other examples of the application of this rule; since, throughout the former, a particular species of tenure, called tenant-right,\* and in the latter, particular

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\* See *Ante*, p. 50.

customs, as to the rights of the miners and the rights to the minerals, prevail; and consequently, *if in one of the manors no example can be adduced of what is the custom in any particular case, it is only reasonable that, in order to explain the nature of the tenure or right in question, which is not confined to a single manor, but prevails equally on a great number, evidence should be admissible to show what is the general usage with respect to that tenure or right.*"\*

In *Marquis of Anglesey v. Lord Hatherton*, 10 M. & W., 237, Lord Abinger says:—"There prevails through these manors upon the border between England and Scotland a particular species of tenure called tenant-right. The tenure respecting those tenements is altogether different from the tenure respecting copyholds; there are peculiar customs belonging to that species of tenure. Now it being admitted that in these manors *all* the tenants hold under the same right, if it should happen that in one particular manor no evidence can be adduced of what is the custom in any particular case, it may be reasonable that in order to explain the nature of that tenure, which is not confined to one manor but prevails in a great number, you may show what is the general usage with respect to that tenure." Referring to the case of *Champion v. Atkinson*, 3 Keb., 90, Baron Rolfe in the same case says:—"That was the case of a manor in Cumberland, and there being in that manor a custom to pay a fine on the death of the tenant, the question was whether in such a case a grassum fine, as it was called, was payable when the lord succeeding was an infant; and upon that question evidence was admitted to show what was the custom of other manors where the grassum fine prevailed. Prove in a particular manor that borough English prevails, and then you may see what the peculiarities of borough English are from other manors: prove that gavelkind prevails, and you may see what are the customs of gavelkind in other manors."

In *Rowe v. Brenton*, a question arose as to the rights as to minerals of certain free conventional tenants in one of the manors of the Duchy of Cornwall. "In each manor," Lord Tenterden said, "the free conventional tenants are said to come and take their lands for seven years. By the Parliamentary survey it appears

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\* Taylor, *Law of Evidence*, secs. 300, 301.



that these tenants claim substantially the same rights, although with some minute variations as to the descent of their estates or the rights of their widows. They state that they must attend the assession courts [courts held every seventh year under a commission from the lord of the soil, desiring certain persons to repair to these manors, and let the lands to the best advantage of their owners], and renew their holdings, but that their right does not cease at the expiration of the seven years. Must we not then, in fairness, in order to ascertain what are the relative rights of the lord and these tenants in one part of this district, inquire what are their rights in another? It appears to me that plain reason and common sense require it, without resorting to decided cases, or nice and subtle distinctions as to whether the matter in dispute be in the nature of tenure or custom. This is not, properly speaking, a question of tenure, nor a question of custom, such as the course of descent attached to the tenure, but a question as to what the lord parted with to those who are called conventional tenants" (8 B. & C., 763).

This case raised no question as to *manorial* title; for had there been no manor at all, precisely the same evidence would have been admissible; provided the land had been all held under the assessional tenure (*Anglesey v. Hatherton*, 10 M. & W., 237).

But the strongest case on this subject, and one that is decisive of the question, is that of *Lowther v. Raw*, 2 Brown's Parl. C., 451. The case is the more interesting, as the Ulster tenant-right claims direct descent from the Border tenant-right. In 1613 Philip, Lord Wharton, and Sir Thomas Wharton, his son, were seized in fee and were lords of certain customary manors in the county of Westmoreland, in which were several holdings held as tenant-right or customary estates of inheritance, descendible from ancestor to heir, according to the customs of the said manors respectively, on payment of fines or gressoms, on change of the lord by death only, called *general* fines, and on change of the tenants by death or alienation, called *dropping* fines, and upon payment of certain annual rents and boons, and on doing and performing suit and service at the manor courts, according to the respective customs thereof. Both the general and dropping fines payable by the customary tenants of the said respective manors had, time out of mind, been reasonable arbitrary fines, at the will of the lord for the time

being, until 1613, when by deed the amount of the fines and their time and occasions of payment were settled. In 1729 the then Duke of Wharton sold to the appellant all the said manors. The Duke died in Spain in 1731, and the appellant claimed a general fine. The tenants refusing, he filed a bill in Chancery. The tenants alleged that by the indentures of 1613 the said general fines were payable on the death of the lord for the time being only. The appellant tendered evidence from customary manors in the counties of Westmoreland and Cumberland, where like deeds had been made to prove that the custom in those manors was opposed to the contention of the tenants. Lord Chancellor Talbot refused to receive this evidence. But on appeal to the House of Lords, his judgment was reversed, and the evidence from the neighbouring manors was held admissible to explain and support the custom.

The analogy of the Ulster tenant-right to the Border tenant-right and the Free Conventiary tenant-right of Cornwall is, in this respect, complete. The Legislature has itself declared the connexion between the various customs of tenant-right existing in Ulster. They are all included under the denomination of the Ulster tenant-right custom. Unless they are "known as," that is, have the general characteristics of the Ulster tenant-right custom, they are not included in the Act. The range of the district is defined, and their general identity is declared by the Legislature. It is only paraphrasing the cases cited to say—Prove that tenant-right prevails generally on an estate in Ulster, and evidence may be given from other estates in which tenant-right prevails, in order to show what on that estate, in special cases—as, for instance, on the fall of leases, on eviction for sub-division or breach of covenant, &c.—are the incidents and peculiarities of the custom.

## JUDGES' DECISIONS, 1873-76.

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### WRIGHT v. TRACEY.\*

*A tenancy for a year certain is not less than a tenancy from year to year ; and therefore sec. 69 of the Land Act not applying, no notice to quit is required.*

The facts are stated *ante*, p. 398.

DOWSE, B.—Lord Coke (*Heydon's case*, 3 Rep. 7 b) says that in interpreting a statute we should consider “first, what was the common law before the making of the Act ; second, what was the mischief and defect for which the common law did not provide ; third, what remedy Parliament had resolved and appointed to cure the disease of the commonwealth ; fourth, what was the true reason of the remedy.” These are the words of a lawyer and a statesman—no mere pedant. Applying the rule—before this statute a tenancy for a year certain did not require a notice to quit to determine it ; the mischief and defect of the common law was the creation of tenancies for a year certain to be renewed from year to year, leaving the tenant uncertain whether the estate he held in the land was to be a continuing estate or not, and thus not only injuring the individual, but injuriously affecting through him the community of which he was a member ; the remedy resolved and appointed by Parliament is that no person shall be at liberty to defeat the benefits that the statute annexes to tenancies from year to year properly so called, by turning them into tenancies ending with each year certain, and with the hope of beginning again for another year certain to end in the same way, and so on from year to year. The case is within the mischief and defect that Parliament intended to provide against. But is it within the words of the statute ? Is a tenancy for a year certain less than a tenancy from year to year ? I think it is. Both tenancies must last for at least the same length of time, and the tenancy from year to year must last a year longer than the other, if the landlord does not serve a notice to quit half a year after the day the tenancy began. In *Gandy*

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\* Ex. Ch., 27th April and 22nd June, 1874 ; before Whiteside, C.J., Palles, C.B., O'Brien and Fitzgerald, J.J. ; Fitzgerald, Deasy, and Dowse, BB. ; 8 I. L. T. R., 142 ; I. R., 8 C. L., 478.

v. *Jubber* (9 B. & S., 18) the Court held that "a tenancy from year to year was a lease for two years certain (*sic*), and that every year after it is a springing interest arising from the first contract, and parcel of it, so that if the lessee occupies for a number of years, these years, by computation from the time past, make an entire lease for so many years, and that after the commencement of each new year it becomes an entire lease certain for the year past and also for the year so entered upon." The Court seem to think that an ordinary tenancy from year to year lasts for two years. That is a mistake, but it in no way detracts from the judgment or reasoning on which it is founded. The words in the statute, "on quitting his holding," mean *on being required* to quit his holding. The words of the Act are not doubtful, and therefore in my opinion notice to quit should have been served in this case.

DEASY, B., held that the tenancy for a year certain was less than a tenancy from year to year, and that under the 69th section the tenant was entitled to notice to quit. "If a tenant from year to year demises for a term of years, and the original tenancy from year to year lasts beyond that term, such a demise is not an *assignment*, but there is a reversion, on which covenant can be maintained" (*Oxley v. James*, 13 M. & W., 214). The Land Act is framed in loose and popular phraseology, and dealing with a subject of popular interest; and no one but a lawyer would have any doubt that a tenancy from year to year, which may last for an indefinite number of years, is a greater tenancy than one limited to a year, and which must terminate at the expiration of that year.

FITZGERALD, J.—As a matter of history, tenancies from year to year, unknown in the time of Edward IV., became recognized when created by express contract in the time of Henry VIII., and by construction of law, to meet the exigencies of society, in the early part of the reign of George III. An ordinary tenancy from year to year is technically, and in contemplation of law, a tenancy for one year certain only, and in that light not greater than the tenancy under the present agreement. It is said that the 69th section of the Act cannot be thus construed, and that a tenancy from year to year is there to be interpreted in its popular sense as capable of existing for any number of years, and therefore greater than a tenancy for twelve months certain. But the Legislature in the Act of 1870 was dealing with matters legal and technical. If this popular interpretation is to be accepted, equally a tenancy from year to year would be greater in a like sense than a tenancy for two years certain, or five, ten, or twenty years, as it might continue beyond these respective terms. I hold that the tenancy

created by the agreement was not less than a tenancy from year to year, and consequently that the defendant was not entitled to notice to quit under section 69. That section seems to be intended to apply to tenancies at will and all other tenancies of a cognate character uncertain in duration, though capable of continuance, but liable to determination by some act of the landlord. I express no opinion as to whether a tenant under a contract such as is now before us may or may not be entitled to compensation for actual improvements.

FITZGERALD, B.—I think a tenancy for one year and no more, created by the express contract of the parties thereto, is not a tenancy less than a tenancy from year to year within the meaning of the Act of 1870. The Act deals with the tenancy from year to year according to its legal nature—i.e., a tenancy at will becoming a term only by construction of law. The definition of tenant in the 70th section has, in my mind, plain reference, to the 4th section of the Landlord and Tenant Act of 1860, which provides that every lease or contract with respect to lands, whereby the relation of landlord and tenant is intended to be created for any freehold estate or interest, or for any “definite” period of time, not being from year to year or any lesser period, shall be by deed executed or note in writing signed, &c. Here, I presume, if the language has any meaning, the words “lesser period” must mean “lesser definite period.” I know of no “definite” period by a letting from year to year greater than one year. A letting for a year certain and no more is not a letting from year to year. How it can be a letting for a less “definite” period, I cannot understand. As to what may be the effect of the same section on lettings from week to week, or from month to month, I express no opinion.

O'BRIEN, J., concurred with DOWSE and DEASY, BB.

PALLES, C.B.—I am of opinion the defendant was not entitled to notice to quit. I agree with my brother Dowse that we cannot restrict the operation of the section to tenancies of an uncertain duration, and I also concur in his reasons for that decision. But I am of opinion that a tenancy for a year certain is not “less than a tenancy from year to year.” The 69th section constitutes a tenancy from year to year a standard of duration; and the use of it as a standard seems to show that the Legislature regarded its duration as fixed and certain. What, therefore, is the duration, in legal contemplation, of a tenancy from year to year? In ascertaining it, we must exclude from our consideration all circumstances which may, but need not, arise during the course

of the tenancy, and affect its duration ; such, for instance, as the omission to serve a notice to quit. Such an omission will operate to extend the duration of the tenancy ; but, whilst the possibility to serve such a notice exists as an incident of all tenancies of this nature, the omission of its use in any one case, or in any number of cases, cannot affect our estimate of the duration of the tenancy in the abstract. We are thus driven to ascertain what is the necessary duration incident to such a tenancy ; and when we arrive at this point all difficulty ceases. We find that such duration is a term fixed and certain—the term of one year.

WHITESIDE, C.J.—I concur in my brother Baron Fitzgerald's reasons for the conclusion that a tenancy for a year certain is not less in law than a tenancy from year to year. "A tenancy from year to year is considered as recommencing every year" (*Tomkins v. Lawrence*, 8 C. & P., 731) ; how, then, can it differ from a tenancy which, by the contract of the parties, begins and lasts in like manner for a year ? I am of opinion that judgment should be given for the plaintiff.

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*In re Estate of DOMVILLE.\**

*An occupying tenant has not, under Part II. of the Land Act, any abstract right to call for a sale to him of his holding at a price offered by him or fixed by the Court.*

This was an appeal from an order of Judge Flanagan, reported *post*, where the facts are fully stated.

BALL, C.—The policy of Part II. of the Land Act is to create an independent proprietary of small holdings in Ireland ; and it has been carried out by the Act, so far as it could be, having due regard to the rights of property and of the owners. Mr. Butt has contended in this case on behalf of the tenant, that each tenant had gained under the Act a peculiar position as respects the entire number of the tenants, which enabled him to work out what seemed to be a sort of equity to become the owner of his own holding at its value, independent of the interests of others. Is it meant by the 46th section that a tenant could go to the Landed Estates Court and say, "I require my holding to be sold to me,

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\* Ch. Ap., 23rd July, 1875 ; before Ball, C., and Christian, L.J. ; 9 I. L. T. R. 134.

and name your own price ;” and is the Court thereupon coerced to sell the holding to the tenant? If so, what would be the effect? Four or five tenants might buy certain lots, and leave the rest. Who would go into competition for the remainder? The effect would be to give it to the occupiers at their own prices. In my opinion there is nothing coercive in the Act to enable a tenant to come here alone out of all the tenants on the estate, and demand as an abstract right a sale to himself of his own holding, even if he added, which is not the case here, “I am willing to pay you whatever price you may require for it.” Circumstances might perhaps arise which would create an equity in favour of a tenant in such a case. But, in my opinion, there was nothing in the proceedings of the Court below, or in the conduct of the owner or his solicitor, which created an equity in favour of the tenant in this particular case to call for a sale to him of his holding, either at the price he offered, or at a price to be fixed by the Court. So far from there having been any tendency to frustrate the policy of the Act, the Court below appears to have been altogether in favour of that policy. The appeal, being untenable, must be dismissed with costs.

CHRISTIAN, L.J., concurred.

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#### VERNON v. RAE.\*

*A notice to quit in one month lands held under a tenancy from year to year, created by written agreement, providing for a resumption on a month's notice in writing, is inadmissible in evidence unless stamped.*

This was an action for breach of covenant in not delivering up possession of certain lands held by the defendant from the plaintiff under a memorandum of agreement, dated 19th November, 1862, which (so far as material) is as follows:—

“That the said Curry Rae shall take from the said J. E. V. Vernon, as tenant from year to year, commencing from the 1st of November, 1862, a field in Seafeld-avenue, Clontarf, containing 4a. 1r. 23p., and pay for the same £27 13s. sterling, payable half-yearly, in equal instalments, on November 1st and May 1st in every year; and shall, at any time that possession of said land may be

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\* Q.B., 17th and 22nd April, 1875; before Whiteside, C.J., O'Brien, Fitzgerald, and Barry, JJ.; 9 I. L. T. R., 125.

required by the said J. E. V. Vernon, his heirs, or assigns, give up and leave the same in good order and repair, upon getting one month's previous notice, in writing, of his, or their intention, to re-assume possession."

On November 27th, 1873, a notice, bearing date the 25th of same month, was served upon the defendant, requiring the defendant to quit, at the end of a month, the said lands. No stamp duty had been paid in respect of the notice.

WHITESIDE, C.J.—The language of secs. 57 and 58 of the Land Act is general, and the words include every notice to quit, and may be used for fiscal, as well as other purposes. The provisions as to stamps do not interfere with any existing agreement; they only refer to a thing affecting the revenue of the country. Suppose an agreement entered into to grant a lease, and that, before the lease was granted, an Act of Parliament was passed increasing the stamp duty on leases, could it be contended that the lease, when executed, should not be liable to the increased duty by reason of the prior agreement? In my opinion, the notice should have been stamped, and not being so, was invalid, and ought not to have been received in evidence at the trial. This disposes, in favour of the defendant, of one count in the plaint on the issue joined, upon which the verdict must be entered for the defendant. But with regard to the length of the notice to quit, I desire to offer—although upon such a statute with hesitation—an observation or two. I think it would be a fair construction of section 58, that it does not overrule antecedent agreements entered into between parties fully competent to contract, and contracting with each other in good faith. If sound principles of legislation, or of the constitutional exposition of statutes could be applied to the Irish Landlord and Tenant Act of 1870, such principles would affirm that it would require express words to convey the intention to overrule pre-existing contracts. The last clause of section 3 of that Act seems to point to this conclusion. In *Chute v. Busted*, 16 I. C. L. R. 222, Lord O'Hagan said:—"The creation of such a liability must be evidenced by the clearest and most unequivocal language before any Court can assume that the Legislature intended to create it, and this on the plainest grounds. There must be clear legislation before a Court could be warranted in holding that, not in procedure or in remedy merely, but in right and obligation, the condition of parties to existing contracts was retrospectively metamorphosed."

O'BRIEN, J.—In my opinion this notice, not having been stamped, was inadmissible. Another important question has been referred to by



my Lord Chief Justice, which it is not necessary now to decide. He has stated his own opinion only, but I may, also, state my opinion. I think the notice, even if it were stamped, would not have availed to entitle the plaintiff to recover. The tenancy in this case was yearly, determinable by one month's notice from the landlord, or three months' notice from the tenant. I think that section 58 applies to this case—it does apply to an agreement made before the Act. It is enough to look at the whole tenor and purview of the Landlord and Tenant Act of 1870, to see that the fact of its interfering with a previous agreement is no objection to give it operation, if it were the intention of the Legislature to do so. Ordinary tenancies from year to year, existing before the passing of the Act, have been most materially affected by the provisions as to compensation for improvements and disturbance. And as to notices to quit also, may it not be said that the rights of such parties, holding under parol agreements, have been materially interfered with under the Landlord and Tenant Act? I should say, if it were necessary to decide it, that the plaintiff was not entitled to recover in ejectment, even though the notice had a stamp; but, although it is not an action of ejectment, but one which has been brought to recover damages for not giving up possession of lands, it would be inconsistent to hold that, while the plaintiff was not entitled to recover the lands in ejectment, he had a right to recover from the defendant damages for not giving up the land, to recover possession of which he was not entitled. We could not limit the operation of the Act in that way. We cannot substitute for ejectment the oppressive proceeding of bringing successive actions for damages, from time to time. If he served a notice to quit in accordance with the 58th section, I have no doubt he could recover in ejectment.

FITZGERALD, J.—I concur in the decision of the Court, considering that the point raised as to the absence of a stamp on the notice is, on this record, fatal to the plaintiff's cause of action on the count for breach of agreement to give up possession. The notice given in this case was a *notice to quit*, and was governed by the 57th and 58th sections of the Landlord and Tenant Act, 1870. If we were to refer to the general heading of those provisions "As to legal proceedings and Court," we should see that in dealing with a notice to quit and the stamp required upon it, we were dealing really with a question of procedure, rather than with any alteration of the rights of the parties. The Court is unanimous on the point that section 57 is retroactive. The inclination of my mind is that section 58 is also, in all its parts, retroactive, and alters the previous rights of the parties—rights created under a pre-existing contract, and does affect the plaintiff's notice to quit, which would have been sufficient

under his agreement, if that agreement had not been affected by the Act of Parliament.

BARRY, J.—I do not think it necessary to add anything to that which my brother Fitzgerald has said. If called upon to decide the second question, whether the 58th section is applicable to previously existing contracts, I would be disposed to hold that it does so apply, but it is not necessary to offer any opinion upon that subject.

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BREW v. CONOLE.\*

*A tenancy for nine months certain, created after the passing of the Land Act, is less than a tenancy from year to year, within the meaning of the 69th section of the Act, and requires a notice to quit to terminate it.*

This was an ejectment on the title to recover possession of certain agricultural lands let under a contract in writing for a time certain, that is to say, from 30th July, 1873, until 1st May, 1874. The question was whether a notice to quit should have been served under sec. 69 of the Land Act.

DOWSE, B.—There can be no doubt that a tenancy for nine months certain is less than a tenancy from year to year, if “less” means less in point of duration, and does not mean exclusively, less in point of nature or character. In my opinion, “less” bears its natural and ordinary signification, especially as it is contained in an Act eminently untechnical in its language, and because we shall thus more effectually carry out the beneficent intentions of the Legislature. If the contention of the plaintiff is right that “less” means less in point of character, and that therefore a tenancy for nine months certain is not within the section, because it is a term of years, as is also a tenancy from year to year, and that therefore they are the same in point of character, this strange result would appear to follow that a tenancy for one week certain is not within the section, because it is a term of years, but a tenancy from week to week, so long as both parties wish, which must last a week at least, is within the section, because not being a term of years, it is less than a tenancy from year to year. Thus, two things

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\* Exch., 12th Jan., 1875; before the full Court; 9 I. L. T. R., 46; I. R., 9 C. L., 151.

equal to one another are not respectively equal to a third to which one of the two is equal—a proposition addressed to lawyers, as alone possessing minds capable of rising to the height of so great an argument. During the argument I inquired was there a case to which the words in question would apply, if “less” had the meaning given to it for which the plaintiff contended. No tenancy can be suggested less in point of quality or nature than a tenancy from year to year, unless it be a tenancy at will. But the case of a tenancy at will is expressly provided for by the section. But, apart from points like these, I take the plain words of the statute. To say that a tenancy for a week certain is not less than a tenancy from year to year, is to charge the Legislature with using language, not to express, but to conceal its thoughts.

DEASY, B.—Reliance was placed on the interpretation clause, defining “tenant” as meaning “any tenant from year to year, and any tenant for a life or lives, or for a term of years under a lease or contract for a lease.” It was contended that by these latter words the Legislature intended to provide for three classes of tenancies: first, tenancies from year to year; secondly, tenancies for lives; thirdly, tenancies for a term of years; and that as a tenancy for any definite period of time, however short, such as a month or a week, came within the legal definition of *terminus annorum*, the letting in this case came within the third class, and was therefore not less than a tenancy from year to year, as all tenancies for years are in point of law equal in quantity, or degree. I am unable to adopt that strict construction of the words “or for a term of years” in that clause. I think the Legislature thereby meant tenants holding for more years than one. I cannot ascribe to them the intention of making the great alteration in the law of landlord and tenant, effected by that Act, applicable to such cases as tenancies for six or three months, or one month, or even a week, which would be the result of this contention. I think the judgments in *Wright v. Tracey* (*ante*, p. 443) are authorities against such a construction. I am therefore of opinion that a notice to quit should have been served in this case.

FITZGERALD, B.—I am of opinion that the letting did not create a tenancy less than a tenancy from year to year within the meaning of the 69th section of the Land Act. I think that the word “less” means in the intendment of law—that is to say, less in the same sense than a tenancy at will is less than a tenancy from year to year, a term of years less than an estate for life, and an estate for life less than a freehold of inheritance—less in quantity of estate, not shorter in period of duration. As estates are distinguished into kinds in respect of quality by known

law, the word "less" where applied to distinguishing estates is *prima facie* to be understood in this its recognized meaning, at least some sufficient reason must be shown for understanding it otherwise. In the next place, if that word in the 69th section is held to mean "of a shorter period of duration," its special provisions would apply to estates already provided for as regards compensation by the previous provisions of the Act, and apparently for the sole purpose (by making a notice to quit necessary) of showing a disregard for the express contract of the parties. Lastly, I am unable to conceive any intelligible mode of applying the common law and statutable practice respecting notices to quit in the case of yearly tenancies to tenancies fixed by contract at a period of duration shorter than a year. I should not, unless an absolute necessity existed, give to a statute a meaning which I can see no reasonable mode of effectuating in practice. There is no invincible reason for understanding the word "less" in any meaning different from that which would, when applied to the quantity of estate, be its *prima facie* meaning. I do not think the question before us was determined in *Wright v. Tracey* (*ib.*). As one of the majority, I rested my judgment in that case on the very ground on which I now proceed—viz., that the Legislature deals with a tenancy from year to year, according to its true nature, as a tenancy at will becoming a term of years by construction of law only; and I pointed out that on legal principles there was no reason for holding such a tenancy a greater estate or interest than a term for a year certain by express contract. On the whole, I think that the tenancy created by the letting in the present case, being for a term certain by the express contract of the parties, is not a tenancy less in quantity of estate than a tenancy from year to year, which at least is but a term, and that therefore it is not within the 69th section of the Act.

PALLES, C.B.—I concur in the judgment of the majority of the Court. I retain the opinion which I expressed in *Wright v. Tracey* (*ib.*) that "less" in the 69th section means "less in point of duration." If the sole object of the 69th section had been to apply and extend the compensation code, it must have been in substance to the effect following:—"Where any tenancy at will is created by a landlord after the passing of this Act, the tenant under such tenancy shall, on quitting his holding, be entitled to compensation in the same manner in all respects as if he had been a tenant as defined by this Act." But the section had a second object—to extend the necessary duration of the tenancy by entitling the tenant to notice to quit. What, then, is the ordinary sense of the words "less than a tenancy from year to year" in a

sentence dealing with the duration of tenancies? I am of opinion that it means less in point of duration. If we read the word "less" as less in quality of estate, I can find no subject matter for its operation other than a tenancy at will. We should thus practically deny the words any effect, and reduce them to an erroneous definition of a tenancy at will. All tenancies for short periods would appear equally to be within the mischief to be remedied. There may be great difficulty in applying the 58th section to the case of a tenant for a time certain entitled, by the construction I have arrived at of the 69th section, to a notice to quit; but the difficulty is quite as great in the case of a tenancy at will, which is admittedly subject to notice to quit. One of the main objects of the Act, taken as a whole, was to discourage, and if possible prevent, the creation of tenancies for short periods. To annex to such tenancies sought to be discouraged such statutable incidents as render them less beneficial to those who create them than tenancies of a favoured character is not an inapt or unusual mode of effectuating such a policy. Examples may be found in many sections of our Subletting Acts. Upon the whole, I am of opinion that a tenancy for nine months certain is within the words, spirit, and meaning of the 69th section of the Act; and that where such a tenancy has been created after the passing of the Act, save for some purpose of temporary convenience or necessity, notice to quit is necessary to its termination.

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#### FERGUSON v. DALY.\*

*Notice was on 1st March, 1872, served upon a tenant whose tenancy commenced on 25th March to quit on 29th September, 1872, or otherwise in the usual alternative form. Ejectionment was brought before 25th March, 1873.—Held, tenancy not determined before ejectionment brought.*

This was an action of ejectionment on the title. The defendant, a tenant from year to year, whose tenancy commenced on 25th March, was on 1st March, 1872, served with a notice to quit on

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\* Exch., 17th and 25th Nov., 1873; before Fitzgerald, Deasy, and Dowse, BB.; I. R., 8 C. L., 216.

the 29th September, 1872, or otherwise in the usual alternative form. The action was brought before 25th March, 1873.

FITZGERALD, B.—It is unnecessary to determine the question whether the 58th section of the Land Act enables a landlord to determine the tenancy by a notice served six months before the last gale day of the calendar year, without reference to the real commencement of the tenancy; or whether the tenancy is still only determinable by notice for half a year expiring at the end of the tenancy, but not even then unless the notice has been served six months before the last gale day of the calendar year, thus giving the tenant twelve months' notice, unless his tenancy commenced on such last gale day. In this case the notice did not determine the tenancy till 25th March, 1873, which period not having arrived at the time of bringing the ejectment, the action was premature.

DEASY and DOWSE, BB., concurred.

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LORD FITZWILLIAM v. DILLON.\*

*A Lady-day tenancy is not determined by a notice served on the 24th of March requiring the tenant to quit on the 29th of September.*

This was a case stated by Dowse, B., on a civil-bill appeal heard by him at the Wicklow Spring Assizes, 1875. James W. Dillon, the defendant, became tenant of a farm on 25th March, 1842, as a tenant from year to year. The notice to quit bore date the 22nd March, 1874, and was served on the 24th of the same year. The ejectment process bore date the 9th October, 1874. The question was whether the notice to quit determined the tenancy.

PALLES, C.B.—The 58th section of the Land Act enacts that “a notice to quit shall not, in the case of a tenancy from year to year, take effect until after the expiration of a period of not less than six calendar months from the date of the service of the notice, such period of six calendar months, in the absence of agreement to the contrary, to ter-

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\* Exch., May, June, 1875; before Palles, C.B., Fitzgerald, Deasy, and Dowse, BB.; 9 I. L. T. R., 106; I. R., 9 C. L., 251.

minate on the last gale day of the calendar year." The words "a notice to quit shall not take effect until," &c., mean that the tenancy shall not be determined by notice to quit until after the expiration of the period specified in the section. The words which follow are no more than a definition of this period. The section does not enact that the tenancy shall determine upon the expiration of the period in question. I cannot find any words which give to a notice served six months before the 29th of September an effect which, before the statute, it could not have had—namely, that of terminating the tenancy before the anniversary of its commencement next following such notice. I have arrived at the conclusion that the time at which a tenancy is to terminate remains the same as before the statute; that the notice to quit, in the case before us, was ineffectual to determine the tenancy on the 29th September, 1874; and that, therefore, the judgment should be for the defendant.

FITZGERALD, B., concurred with the Lord Chief Baron.

DEASY, B.—I think the words in the section, "unless an agreement to the contrary is shown," apply to the case. I see nothing in the language of the Land Act sufficient retrospectively to annul the term in the contract of tenancy, that it could only be terminated by a notice to quit ending in March. In order to do so, it would be necessary to insert the word "express" before the word "agreement," which I think I am not warranted in doing.

DOWSE, B.—I agree with my brother Deasy in the reasons he has given. I am of opinion that when the statute enacts that a notice to quit shall not take effect until after the expiration of a period of not less than six calendar months from the date of the service of the notice, it must be taken to enact also that at the expiration of the said period it shall take effect, and take effect in the only way a notice to quit can take effect—that is, by determining the tenancy. But the section also contains the words "in the absence of agreement to the contrary." The agreement need not be in writing. When the statute requires an agreement in writing, it expressly says so. It is said the agreement should be a specific or express agreement. I cannot adopt this view. I am of opinion an implied agreement is quite as good as an express or specific agreement. There is really no difference between them, except in the mode of substantiating the agreement (*Leonard v. Taylor*, I. R., 8 C. L. 300, 305). I think there is an implied agreement here, and that consequently the notice to quit in this case was not effectual to determine the tenancy.

## DOYNE v. CAMPBELL.\*

*Holding agricultural or pastoral in its character.*

This was a case stated by Deasy, B., which arose on a civil bill appeal on a process for rent in respect of 25 acres (Ir.) of land, situate five miles from Dublin, taken by a Dublin merchant, at £300 a-year, as a residence, but also with the intention of making profit out of the land, which would assist him in paying the rent. About 15 acres were in pasture and the remainder under buildings, ornamental grounds, and plantations. The rent, at a valuation, would be properly apportioned at £200 for the dwelling-house, garden, and ornamental grounds, and £100 for the rest of the premises. The tenant kept about twenty head of cattle on the land, and in one year had twenty tons of hay off it. The letting was made in 1871. The tenant claimed to deduct one half the county cess under sec. 65 of the Land Act. The only question reserved on the case stated was whether the holding was agricultural or pastoral, or partly agricultural and partly pastoral, within the meaning of the 71st section of the Land Act.

PALLES, C.B.—To ascertain the character of the holding, we must look at the entire holding. Looking at the entire of the holding and having regard to the dealings of both parties respecting it, for the purpose of ascertaining its character, we find both parties dealing with it as a residence, and not as an agricultural or pastoral tenancy, and it is impossible to think that it would have been taken as a farm. It would not serve the purpose of making money by its use as a farm. Indeed the evidence of the defendant himself is conclusive on the question. Its primary use to him was as a residence, with the subordinate use of making money out of the land attached, out of which he believed he could make a large portion of the rent. But he took it as a residence as being its primary use. Looking at the entire character of the holding, and not merely of the land, we consider that it was held as a residence, and that upon the evidence it has not been shown to have been agricultural or pastoral.

DEASY, B.—Not that I entertained any doubt on the question, but as its determination involved a future yearly liability to county cess, and

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\* Exch. 7th June, 1874; before Palles, C.B., Fitzgerald, Deasy, and Dowse, BB.



would affect a considerable extent of property in the vicinity of large towns, I thought it right to state the case for the opinion of the Court. With that opinion now expressed I concur.

DOWSE, B.—I shall only add that in my opinion this holding cannot properly be described as a farm with a house on it.

FITZGERALD, B., concurred.

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FLYNN v. VERNON.\*

*A notice to quit, followed by an ejectment for non-payment of rent, where the tenant does not redeem, is not an act of disturbance by the landlord.*

This was a claim for compensation for disturbance. The claimant had been served with notice to quit, and subsequently a decree was obtained against him on a civil bill ejectment for non-payment of rent. He then served his notice to claim, and this was followed by the execution of the decree for possession. The tenant did not pay the rent and redeem. The tenant had also neglected to pay a previous year's rent until served with an ejectment process, and then paid by letting the land in conacre, in breach of his agreement of tenancy. He had not kept the premises in tenantable repair, but had allowed them to become deteriorated.

DEASY, B.—I cannot say that this was a capricious eviction, or one for which the tenant is fairly entitled to compensation. The 9th section of the Act says—"Ejectment for non-payment of rent, or for breach of any condition against assignment or subletting shall not be deemed disturbance." The landlord has virtually lost two years' rent; and even if the proceedings for non-payment of rent were not a waiver of the notice to quit, and if I were to give this man all he claims, the landlord's claim for rent would overwhelm it. I do not think it ever was intended by this Act that the mere fact of the service of a notice to quit should, of itself, amount to a disturbance. The landlord may never have to act on

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\* Land Appeal, County Dublin, 18th Dec., 1874; before Deasy, B.; 9 I. L. T. R., 50.

the notice to quit at all, so as to give it effect as a disturbance. In this case the notice to quit was not acted on. It is the tenant's own fault that he is not now in possession. There is another fact in the case. The section gives compensation for loss of possession; yet the claimant swears he was at a loss by the land nine years out of ten. That alone extinguishes the claim in point of substance.

The Chairman's dismiss was affirmed, with costs.

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M'DONALD v. GRANLEES.\*

*A tenant who had originally taken land on a conacre letting, but had continued in occupation as a yearly tenant, and was capriciously evicted.—Held, entitled to the maximum amount of compensation for tenants of his grade in the scale.*

The claimant had originally taken two fields, one for grazing, and the other a conacre letting. As the then landlord did not reside on the premises, the claimant was permitted to continue in occupation, paying a yearly rent, until the ejectment proceedings were taken, on which the claim arose.

FITZGERALD, J.—This was originally a conacre letting which by the acts of the parties became a yearly tenancy. It is a case of capricious eviction, and in such a case I give the maximum amount of compensation for disturbance.

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ROGERS v. FITZGIBBON AND OTHERS.†

*A claim does not lie against the Receiver Master in the case of dispossession by him at the termination of a lease made by him in his official capacity.*

This was a claim for compensation for improvements by a tenant dispossessed by the Receiver Master at the termination, by effluxion of time, of a seven years' lease pending the cause. The

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\* Monaghan Summer Assizes, 1874; before Fitzgerald, J.; 9 I. L. T. R., 73.

† Cork Summer Assizes, 1873; before Deasy, B.; 8 I. L. T. & S. J., 297.

cause was still pending. The respondents named were the Receiver Master and all the other parties named in the title of the Chancery cause. The lease was in the common form used in the Irish Court of Chancery, the practice here differing from the English practice in this, that the lease is made, not as in England, by the receiver, but by the Receiver Master. It did not appear from the lease who were entitled to the said lands.

DEASY, B., dismissed the claim on the ground that the Receiver Master was an officer of the Court of Chancery, that the letting was made by him in that capacity, and that, under these circumstances, he was not subject to the jurisdiction of a Land Court.

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O'MEARA v. TRANT.\*

*The devisee of a farm held by lease, though the lease determined by the death of the testator, is entitled to claim in the Land Court:*

*A covenant by the lessor to pay for improvements made by the lessee with the previous consent of the lessor, and not otherwise, not exceeding a fixed amount, does not bar a claim for compensation for improvements.*

The claim was for improvements in respect of a farm held under lease made on 4th August, 1841, for the lessee's life or 31 years. The claimant was devisee under the will of the lessee. The claim arose on ejectment consequent upon the determination of the lease by the death of the lessee after the expiration of the years in the lease. The lease contained a covenant that he the said John Trant [lessor], his heirs or assigns shall at the expiration of the term hereby demised pay to the said Thomas O'Meara [the lessee], his heirs, &c., such sum or sums of money, if any, as shall amount to the value of all such permanent and substantial improvements as shall be on the demised premises, and as he the said Thomas O'Meara, his heirs, &c., shall have made on the said demised premises or any part thereof, with the previous consent in writing

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\* Nenagh Spring Assizes, 1875; before Dr. Battersby, one of the going Justices of Assize; 9 I. L. T. R., 74.

of the said John Trant, his heirs, &c., to be endorsed in these premises, and not otherwise, not exceeding, however, in the whole the sum of £500." No consent had been sought by the lessee as to any improvements, and consequently no endorsement was made upon the lease.

The Chairman held that an interest passed under the will to the devisee of these lands (though the lease determined by the death of the testator) sufficient to give him a *locus standi* in the Land Court; but that the covenant precluded the claimant from claiming compensation in any Court; that it amounted, at the least, to an agreement that no compensation was to be claimed except the improvements were endorsed on the lease, and that the words "not otherwise" in the covenant expressly excluded a right to compensation for unendorsed improvements under subsection 2 of section 4 of the Land Act. He therefore dismissed the claim. On appeal,

DR. BATTERSEY held that the title under the Land Act was wholly irrespective of the covenant, and that, although if the lessee sued on the covenant he could not recover for more than the sum specified, such covenant did not deprive him of any independent right. But for the covenant he could not recover for such improvements at all, and if he made improvements beyond the amount in the covenant, the Act gives him compensation for such improvements to the full amount, whether he had the remedy by the covenant or not. The covenant gave the benefit to the tenant, but took nothing from him. The words "not otherwise," in my opinion, only apply to the mode in which the consent is to be given—viz., in writing to be endorsed on the lease. The absence of previous consent by the lessor does not therefore affect the case.

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#### GUARDIANS OF THE LIMAVADY UNION v. HENRY TYLER.\*

*Lands formerly held with a tenement in a town of 2,700 inhabitants, and within the boundary of the Town Commissioners' district, though never regarded as town-parks.—Held, town-parks within the meaning of the Land Act.*

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\* Land Appeal, Derry Spring Assizes, 1872; before Keogh, J.; 6 I. L. T. R., 134.

This was a claim for compensation for disturbance and improvements in respect of 10 acres of land, leased in 1847 for 21 years by the respondent to the claimants, and which was used by them as a workhouse farm. In 1700 the lands in question, with a tenement in the town of Limavady, were let in perpetuity to the respondent. The lands were within the 'Town Commissioners' boundary.

KEOGH, J. :—I hold the premises in question are town-parks within the meaning of the 15th section of the Land Act. I disallow the claim for disturbance, and affirm the Chairman's decree for improvements.

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#### LARKIN v. TUOHEY AND SPAIN.\*

*Where a lessee, whose term was nearly expired, and who was refused a renewal, pulled down a dwelling-house and offices sufficient for the claimant and his family, and erected another dwelling-house, but no offices, with the express object of running up a bill for compensation against his landlord.—Held, that this was unreasonable conduct under the 18th section, and that it disentitled him to compensation therefor.*

FITZGERALD, B. :—The 18th section gives a very large discretion to the judge, and as in every case in which a large discretion is given, it is, in proportion to its largeness, to be exercised with great discretion. The Chairman, in his notes, states "that at the time of the execution of the lease"—a lease dated the 14th February, 1851, for 21 years, and which expired on 25th March, 1872—"there was a good dwelling-house and offices thereon, sufficient for and suitable to the holding. About twelve years ago a portion of this dwelling-house was burned down, but was rebuilt and restored by the claimant. In November, 1870, when there was but one year and five months' term unexpired, there were on the lands a dwelling-house and offices sufficient for the claimant and family therein; but the claimant, having shortly before appealed to the respondent's wife and son for a renewal of the lease—the respondent being in America—and being apprised that such lease would not be given him, as the respondent was expected to return from America, and would require the lands for his own use, the claimant formed, and

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\* Land Appeal, Nenagh Spring Assizes, 1873; before Fitzgerald, B.; 7 L. L. T., 95.

announced to others, the design of pulling down the dwelling-house and offices, and erecting another house, for the purpose of running up a bill against the respondent, so that he would never care to take up the lands again; and, in pursuance of such determination, the claimant, though cautioned by the respondent's son not to do so, did pull down the dwelling-house and offices, and did with the materials thereof and other materials erect a large slated dwelling-house, being the dwelling-house for which compensation is claimed, but did not erect any offices in place of those pulled down." I entirely concur in the Chairman's view of the facts thus found by him. It was argued, on behalf of the claimant, that the 18th section does not apply where the compensation is claimed for improvements, but only to the case of disturbance. In my opinion it is impossible to sustain this proposition. The words of the section are perfectly general. 'In addition to this, it contains at the end of it a clause specially referring to the case where compensation is claimed for disturbance. This clause, by making this distinction, impliedly shows that the section also refers to a claim for alleged improvements. Therefore I must hold that it applies to the present case, and the only question for me to consider is whether the tenant is disentitled to compensation. The case I have to deal with is the case of a man making the improvements claimed with reference to his own enjoyment. It may be quite true that, if the improvements were suitable, this circumstance alone would not disentitle the claimant to compensation; but I cannot agree that it is not an element to be taken into consideration. It was not only made with reference to his own enjoyment, but with a view to the continuance of the interest in the lands, and with the knowledge that the renewal would not be granted. What was done was done with the view of putting this embarrassed landlord under such pressure that his own intention to resume possession of the lands, sanctioned by the statute, should be thwarted. If there be any conduct disentitling a tenant to compensation, this was such.

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#### RYAN v. RYAN.\*

*The stamp on a notice to quit must be impressed.*

In this case the stamp was adhesive.

FITZGERALD, B., held that the notice so stamped was not properly stamped; it should have been impressed.

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\* Land Appeal, Nenagh Spring Assizes, 1873; before Fitzgerald, B.; 7 I. L. T. R., 96.

## PRATT v. SWEETMAN.\*

*A tenant of a grazing farm for a number of years brought in to feed his sheep a small quantity of hay and turnips, and employed men to spread the droppings, but during the last year of his tenancy took a crop of hay off the entire farm.—Held, that he was not entitled to compensation for unexhausted manure.*

The claimant, Captain Pratt, was tenant from year to year of Tubber demesne, containing 167 acres, at £390 rent. On ejectment he claimed compensation for improvements, the lands being let for and used as grazing lands. The only item which was disputed was a claim for unexhausted manures. He brought in yearly 8 tons of turnips at 15s. per ton, with which the sheep were fed. Their droppings were spread over the grass as top-dressing. The claim in respect of this was disputed.

WHITESIDE, C.J.:—The Act defines improvements as including “tillages, manures, and other like farming works.” I must interpret this language exactly as the Legislature has given it to me, and I should be greatly embarrassed in holding that the droppings of cattle could be brought under these words. I would feel great difficulty in adopting the interpretation of these words hinted by Pigot, C.B., in *Kelleher v. Jackson*.† In the present case, on the evidence, and having regard to the words of the last part of the Act, supposing the case did come within its definition, yet I must hold that all benefit derived was exhausted at the time of the claimant’s quitting his holding.

## O'BRIEN v. HURLEY.‡

*Claimant held a farm for which in lieu of rent he gave his services as bailiff.—Held, not disentitled to compensation for disturbance.*

MORRIS, J.:—O'Brien, the claimant, was bailiff on this property, and for services in that capacity he was granted a house and some portion of land. This constituted as good a tenancy as any known to the law.

\* Land Appeal, Wicklow Spring Assizes, 1873; before Whiteside, C. J.; 7 I. L. T. R., 96.

† *Ante*, p. 392.

‡ Tralee Summer Assizes, 1873; before Morris, J.; 7 I. L. T. R., 173.

His conduct was bad in telling the tenants that, though he was present when they agreed to pay increased rents to the respondent's father when living, he would not swear against them if they denied this agreement. But bad as his conduct was, the respondent was willing to continue him as tenant at an increased rent. Taking all the circumstances into consideration, and dealing with the case with a rough kind of justice—the only mode of treatment of which this class of cases is susceptible—I shall allow two years' rent as compensation for disturbance.

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**B. O'BRIEN v. HURLEY.\***

*No costs given where an exorbitant claim is put in.*

The claimant's rent was raised to £80 from £64. He refused to continue tenant on these terms. Ejectment proceedings were taken, and a decree for possession obtained by the respondent. Claimant then offered to take the land at the rent previously proposed. The respondent refused this offer, unless the claimant also paid the costs of the ejectment proceedings (£100). The Chairman awarded the maximum amount of compensation for disturbance.

MORRIS, J., reduced the compensation by one year's rent. He gave no costs, and expressed his surprise that the Chairman should have given costs against the respondent for defending a claim for £609 which had been reduced to £174.

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**LYNCH v. CROSBY.†**

*A real transfer of the land and its profits, though not carried out in strictly legal form, is an assignment within the meaning of the Land Act.*

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\* Tralee Summer Assizes, 1873; before Morris, J.; 7 I. L. T. R., 175.

† Land Appeal, Tralee Summer Assizes, 1873; before Morris, J.; 7 I. L. T. R., 174.



*Where the rule of an estate prohibits sub-letting or assignment, a tenant introducing his son-in-law as manager of the farm.—Held, entitled on disturbance to reasonable compensation.*

The claimant, Lynch, on the occasion of his daughter's marriage, asked the landlord's consent to his son-in-law living with him on the farm. The landlord made no objection. The son-in-law managed the lands and enjoyed the profits, and was to have the farm on the death of his father-in-law. There was no evidence that the claimant had assigned or sub-let the lands. The rent was paid in the claimant's name. He was subsequently served with notice to quit for violating the estate rule against assignment or subletting.

MORRIS, J. :—I think that the assignment contemplated by the 9th section of the Land Act does not necessarily mean an assignment carried out with all the pomp and ceremony of the law. It would, in my opinion, be sufficient to come within the terms of the Act, if there was a real transfer of the land and its profits from one person to another; and this, I think, has not taken place in this case. The silence of the respondent, when the claimant informed him he intended to bring his son-in-law to live with him, meant consent. By the marriage settlement, the son-in-law having paid his father-in-law a good portion of his fortune, was to have the farm on his father-in-law's death; and I do not see in that arrangement anything against the law of the land or the customs of the place. Besides, the father-in-law is proved to have surrendered to the landlord a portion of the farm, in direct antagonism to the son-in-law's wishes. I shall not give the maximum compensation, but reduce it by one year's rent.

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#### HODGINS v. DUNALLY.\*

*Town-parks. When the respondent appeals, the claimant cannot amend his claim by reducing the number of years' rent claimed for disturbance, so as to be entitled to obtain compensation for minor improvements.*

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\* Land Appeal, Nenagh Summer Assizes, 1873; before Fitzgerald, B.; 7 I. L. T. R., 181.

The claimant, W. R. Hodgins, held a field as tenant from year to year under the respondent. He lived in Cloughjordan, which was more than a quarter of a mile from the nearest point of the field. The claimant farmed six other farms in the neighbourhood. He used this field for resting his cattle, before sending them by rail to Dublin, or when shifting them from one of his other farms to another. The land was commonly known as "townlands."

The respondent appealed from the Chairman's decision in the claimant's favour. On the appeal coming on, claimant's counsel applied to amend his claim for disturbance, by reducing the number of years' rent claimed from seven to five, in order to claim for minor improvements.

FITZGERALD, B.—The appeal is by Lord Dunally, the respondent in the Court below. Mr. Hodgins now wishes to make a different case from that made there. I cannot allow him to amend.

Evidence was given to the effect stated.

FITZGERALD, B.:—There are three requisites in this case (for I consider the expression "ordinarily termed town-parks" as merely explanatory)—first, that the land should adjoin a city or town; secondly, that it should bear an increased value over and above the ordinary letting value of land occupied as a farm in the neighbourhood; and thirdly, that it should be in the occupation of some person living in the city or town. I assume that Cloughjordan is a town. If so, these lands are certainly near to or adjoining a town, and they are also in the occupation of a person living in the town. But do they bear an increased value within the meaning of the 15th section? This must mean that they bear an increased value by reason of their being in the neighbourhood. But that is not sufficient. They must bear an increased value as accommodation land. The question then arises, what is accommodation land? It means land taken by persons living in a city or town for the accommodation of their residences. I don't think there is any evidence before me that these lands were taken with this object. The greater number of the inhabitants of Cloughjordan are, like Mr. Hodgins, farmers. I have no reason for saying that the value of these lands is over and above the ordinary letting value of the neighbouring farms, owing to their having been held by Mr. Hodgins for the accommodation of his house in Cloughjordan. I therefore affirm the Chairman's decree for compensation for disturbance.

## CAMBIE v. O'KEEFFE.\*

*Unreasonable conduct of tenant.*

The facts appear in the learned judge's judgment.

FITZGERALD, B. :—This is the case of an agent who has taken up the land of a tenant, for the purpose of holding it himself, concealing for several years from his employer the fact that he has done so, and who has taken it up, knowing that the landlord wanted it for the purpose of making an expenditure upon it himself, and including it in the farm by which it was enclosed. I think this case comes within the provisions of the 18th section of the Land Act, and that the tenant's conduct was such a "default or unreasonable conduct as to affect the matter in dispute between the parties." I consider the case not a proper one for awarding compensation.

## LOUGHNANE v. CHARTERIS.†

*An assignment by the sheriff under an execution is within the operation of the 13th section of the Land Act. Question reserved.*

This was a claim for compensation for disturbance. The claimant was the purchaser under a *fi. fa.* of a farm held under a tenancy from year to year. The term was assigned by the sheriff without the consent of the landlord. At the sheriff's sale notice was given by the landlord that he would not recognize as tenant any purchaser of the said term at the said sale. The landlord never accepted the claimant as tenant. The farm formed part of an estate upon which the assignment of holdings, without the consent of the landlord, was not warranted by the practice prevalent on such estate.

FITZGERALD, B.—My own opinion is that this was an assignment within the meaning of the 13th section of the Land Act. But I

\* Land Appeal, Nenagh Summer Assizes, 1873; before Fitzgerald, B.; 7 I. L. T. R., 182.

† Land Appeal, Clonmel Summer Assizes, 1873; before Fitzgerald, B.; 7 I. L. T. R., 184.

am willing, if the claimant desires it, to reserve the point for the Court for Land Cases Reserved.

The claimant requested to have the case reserved. His lordship subsequently drew up a dominical; but the case was not prosecuted further.

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CONOR *v.* SWEETMAN.\*

*A dwelling-house, value £1,400, erected on a seventy-five acre farm, and used principally as a residence, the land being separately let, is an improvement unsuitable to the holding, and therefore not to be registered as an improvement under sec. 6 of the Land Act.*

This was a claim to register, under sec. 6 of the Land Act, as improvements, buildings valued at £1,810, erected upon a farm of 75 acres, leased in 1825 for three lives. Of this sum £1,400 represented the value of a dwelling-house, the remainder the value of a barn, stable, and other offices. The place was used as a farm between 1826 and 1825, in which interval the improvements were made. In 1839 the lessee assigned the premises, getting £500 fine, and an increase of £40 a year on the rent.

O'BRIEN, J.:—The letting value has been increased. But was it increased in proportion to the expenditure? Take the £500 fine out of the £1,810, and that would leave £1,300 expenses. Can any one say that there was an increase in the value of the holding proportionate to the expenditure, when only £40 a year was left against £1,300 paid down? Moreover, the value of the land had risen in the interval between 1825 and 1839. To compensate the expenditure a competent witness says there should be a return of six per cent. or £78. This place has been taken by various persons as a residence, and others farmed the land. I think that the increase in the value of the holding was totally disproportionate to the expenditure; and I shall hold the dwelling-house to be an improvement not suitable to the holding. I therefore decline to register it as an improvement; but I shall allow the other buildings to be registered.

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\* Land Appeal, Kildare Spring Assizes, 1874; before O'Brien, J.; 8 I. L. T. R., 101.

## HAYDOCK v. RYND.\*

*To work a forfeiture of compensation for disturbance, the willingness of the landlord to continue the tenant in occupation on fair and reasonable terms must be continued till the hearing.*

*Just and reasonable terms considered.*

*• No costs of appeal, where the Chairman's decision is reversed on a point not raised before him.*

This was a claim for compensation for disturbance in respect of a farm held by the claimant at a rent of £60 yearly, of which he was dispossessed for refusal to pay an increased rent of £80 under a lease of three lives or 31 years which was offered him by the landlord. He had become tenant in 1850 at a rent of £50, abated in 1852, '53, and '54, raised to its former amount in 1855, and to £60 in 1868, under a written agreement then entered into. The claim was brought before the Chairman on 30th March, 1874. On the 17th of the same month the respondent had demised the lands to another tenant for 45 years. The Chairman dismissed the claim.

PALLES, C.B.—Upon the hearing before me it was contended on the part of the claimant that, as the execution of the lease on the 17th March, 1874, deprived the respondent of the power to continue the claimant as tenant of the lands, the case was not within the proviso in the 18th section, which says, "In any case in which compensation shall be claimed under section 3 of this Act, if it shall appear to the Court that the landlord has been, *and is*, willing to permit the tenant to continue in the occupation of his farm upon just and reasonable terms, and that such terms have been, *and are*, unreasonably refused by the tenant, the claim of the tenant to such compensation shall be disallowed." This question was not raised before the learned Chairman; and, whilst I hold that, subject to the provisions of the rules as to the matters to be comprised in notices of claim and dispute, neither party is, upon the hearing of an appeal under this Act, debarred from relying upon questions not previously suggested, I think that the omission to bring forward until the hearing of an appeal a question of such cardinal importance to the decision as that which arises in the present case, is subject to the gravest objection. The omission, however, although it

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\* King's County Summer Assizes, 1874; before Palles, C.B.; 9 I. L. T. R., 7.

may affect the costs of the appeal, can have no bearing upon the construction of the Act. The words of the Act carefully distinguish between the time past and the time present; they expressly refer not only to the previous existence of a certain state of facts, but to the continuance of that state of facts, until, and its existence up to the time of, the hearing of the dispute. There must not only be a willingness on the part of the landlord, but a willingness continuing at the hearing—not only a refusal by the tenant, but a refusal persisted in to the same period. The words, thus construed, appear to be in harmony with the scope and object of the Act. The effect of the words “and is,” “and are,” is to afford to the tenant until the hearing of the dispute a *locus penitentiae* against the forfeiture of his right to compensation for disturbance. Unreasonable conduct at a prior period, although not persisted in, may be taken into account as one of the elements material to the case, but in order that such conduct shall *per se*, and irrespective of all other circumstances, work a forfeiture; in order that it shall pass from a matter to be dealt with at the discretion of the judge to that which extinguishes all discretion, it must be persistent, and persistent till the hearing. I must therefore hold that the respondent by the execution of the lease disabled himself from relying upon the proviso in question.

On the question of unreasonable conduct generally, having regard to the deliberate nature of the change of rent in 1868, to the length of time for which the appellant had primarily held the land, to the circumstances which attended that prior occupation, as well as the possession under the new agreement, and the evidence as to the value of land in 1872 and 1873, I am of opinion that neither party has been guilty of unreasonable conduct. It was not an unreasonable thing that the tenant should in 1872 object to an increase of the rent deliberately fixed in 1868, when he believed such rent to be fair. Neither can I say that the respondent was unreasonable in endeavouring to obtain for the land that higher rent, which, upon the evidence, I hold that he not unreasonably believed it to be worth.

Upon the question of deterioration, I am of opinion that the farm has been deteriorated. Such deterioration was a breach of an implied term in the contract of tenancy; but as no mention has been made of it in the notice of dispute, I cannot regard it as an element which I am at liberty to take into consideration.

As to the amount of compensation, the holding is not residential. No evidence has been offered that the tenant might not have obtained at a fair and reasonable rent land of the same character in a position equally convenient to the farm (to which the holding in question was

used as a draw-farm). In fact the evidence appeared to point to there being much land of this character in the neighbourhood. Still, there must be some loss occasioned by a change from one farm to another. I think that £30 will amply compensate that loss—each party to abide his own costs of the appeal.

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MURPHY *v.* GORDON.\*

*Form of Claim—Practice.*

DOWSE, B., held that when a tenant valued under £10 claims more than five years' rent, and also compensation for minor improvements, the claim may be heard in the first instance without amendment, and at the close of the case the Court will determine whether the full claim for disturbance shall be allowed or a lesser claim with compensation for minor improvements.

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REILLY *v.* DOYLE.†

*Town-parks.*

The claim was in respect of a holding of 5 acres, situated a little more than a mile from the town of Gorey. The rent was the usual letting value of the land, which was always cultivated as an agricultural farm. The land had been leased, as was the custom on the estate, to a tenant of a house in the town, as appurtenant to the house, originally on leases for 31 years, or three lives, for the purpose of encouraging building in the town.

DOWSE, B.—In my opinion it would be an abuse of terms to call this holding a town-park. The 15th section does not apply to this case.

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\* Wexford Summer Assizes, 1874; before Dowse, B.; 8 I. L. T. R., 196.

† Wexford Summer Assizes, 1874; before Dowse, B.; 8 I. L. T. R., 209.

## WILSON v. EARL OF ANTRIM.\*

*Town-parks.*

This was a claim under sections 3 and 4. The claimants lived in the town of Glenarm, and the lands were about half a mile distant from the town. The town contains about 1,000 inhabitants. The lands round about the holding in question were let to butchers, publicans, tailors, and others living in the town, for accommodation, and were described in the rentals as town-parks.

KEOGH, J.—I think the lands are town-parks. Lands that were not town-parks two hundred years ago might become town-parks from the fact of a town growing up about them. Besides there is a rent-book before me which appears to have been kept very accurately by a former agent of the estate, and in that book I find these lands described years before the Land Act as “town-parks.” Even though this agent were the most speculative man in the world, he could have had no idea of the Land Act and its provisions.

## RAPHAEL AND MORTON v. SINCLAIR.†

*The grand jury cess sections of the Land Act apply only to holdings agricultural or pastoral, or partly agricultural and partly pastoral.*

The appeal was from a decree on a rent process, by the tenant of certain premises situate in the town of Ballymena, who claimed to deduct one half the county cess.

KEOGH, J.—I have consulted my brother Lawson on this case, and we have no doubt that the 65th section (like all the other sections of the Land Act) is controlled by the definition of “holding” in section 71.

## FYFFE v BARRETT.‡

*Time of lodging appeal.*

The respondent appealed on the eighth day after the last day of the ordinary Donegal Sessions, at which the claim was heard. It was objected that the appeal was too late, Sunday counting as a day of the week, in the absence of express provision to the contrary (*Peacock v. The Queen*, 4 C. B. N. S. 264).

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\* Antrim Summer Assizes, 1874; before Keogh, J.; 8 I. L. T. & S. J., 501.

† Antrim Spring Assizes, 1873; before Keogh, J.; 7 I. L. T. R., 202.

‡ Donegal Spring Assizes, 1875; before Barry, J.



BARRY, J., after taking time to consider the point, said he had consulted with his brother Fitzgerald (B.), and they were of opinion that the appeal was taken too late, the last day of the ordinary sessions having been Wednesday, and the appeal not having been lodged till the Thursday following. Neither the statute nor Rules excluded Sunday from the computation of time, and it must consequently be reckoned as one of the days of the week within which notice of appeal is to be given by Rule 38 (Part I.).

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KAVANAGH v. RICHARDSON.\*

*Two separated holdings for which a bulk-rent is paid.—Held, to constitute the holding, by the rent of which compensation for disturbance is to be awarded.*

The claimant got two holdings at different times, the first a house and garden; the second a farm of 4 acres, separated from the other; but they were afterwards consolidated by the rent being paid in a bulk sum for both. The Chairman gave compensation for disturbance, in respect of the 4 acres only.

MORRIS, J., held that the decree for disturbance should be in respect of the consolidated holding; but, holding that the eviction was not capricious, diminished the number of years' rent awarded.

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MILLIKEN v. HARDY.†

*A lessee cannot claim for improvements made by a tenant under a previous lease, the interest in which he has purchased.*

This was a claim for improvements, arising on ejectment at the expiration of a lease. In 1854 the claimant's father, George

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\* Omagh Spring Assizes, 1875; before Morris, J.

† Belfast Summer Assizes, 1875; before Morris, J.

Milliken, purchased the tenant's interest in a lease made in 1833, by the respondent's predecessor in title, for one life or 31 years. The then landlord, in 1854, gave to George Milliken, while the old lease had still some years to run, a new lease of the lands for 12 years from the time when the old lease would have expired, at a slightly increased rent. The Chairman dismissed the claim.

MORRIS, J., held, on the authority of *Holt v. Lord Harborton*, (*ante*, p. 175) that the claimant was not entitled to compensation for improvements executed prior to the new lease made in 1854. The lessee of the 1833 lease was not the predecessor in title of the present claimant. Predecessor in title did not mean predecessor under another title, but predecessor in the same title.

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#### COULTER v. OGILBY.\*

##### *Acquisition of the tenant-right.*

*Enforcement of the ancient custom, notwithstanding disallowance of the same on the estate since 1853, in the case of a farm held under a tenancy created before that date.*

This was a claim under the Ulster tenant-right custom, by a tenant ejected for non-payment of rent. The respondent in his notice of dispute said that he had no intention of interfering with any custom or usage which the claimant could show existed as regarded the portion of said lands of which he was in possession at the time the lands of Garvagh were conveyed to respondent's father; and that he disputed the claim for compensation, and denied that the land was subject to said custom; and that, if the claimant should pay to him the rent due in respect of said holding, he had no objection to his resuming possession of the lands from which he had been disturbed. The lands in question formed part of the Belmore estate, a portion of which was in 1853 purchased by the respondent's father. The claimant's father, a predecessor in title, was then a yearly tenant of 8 acres, Irish, at the rent of £13; and the tenant-right was universally conceded on the Belmore estates. Subsequently, Coulter obtained several additions\* to his farm from

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\* Omagh Spring Assizes, 1874; before Whiteside, C.J.

the respondent's father, without incoming payments. The farm thus enlarged, in respect of which the claim arose, consisted of 22 acres, Irish, at a rent of £33. The respondent's father, from the date of his purchase in 1853 till his death in 1873, denied any right of sale to his tenants, or the benefit of any usage previously existing. The respondent contended that he had, by giving one year's rent to the out-going tenants, whose farms Coulter got, and holding the land for a month or two in his own possession, acquired the tenant-right, within the meaning of the Act. The rent receipt was given for the consolidated farm. Tenants evicted for non-payment of rent were allowed to sell in Lord Belmore's time. The Chairman awarded £220, under the custom alleged by the claimant.

WHITESIDE, C.J.—The purchase by Mr. Ogilby of this estate in 1853 could not discharge the holdings of which it consisted of the tenant-right custom then existing. As to the eight acres, then in the possession of Coulter, there is no difficulty. But is the remainder of the holding subject to any custom or usage? If a practice existed on an estate for a reasonable length of time, prior to the passing of the Land Act, and was not got up immediately before its passing, or in expectation of it, so as to evade its operation, that was the usage which the statute legalized. Coulter got into possession without in-put, and without any increase of rent, which would have been another way of accomplishing the same object. He obtained possession from the landlord of the lands from which the previous tenants were evicted; and this was done in the course of management of the estate. Was this a purchase, or acquisition by the landlord? On this point Mr. Butt (*Land Act*, p. 328) says:—"If, before the passing of the Act, any tenant had agreed with his landlord to surrender his rights under the custom, the legalizing of the custom gives him no power of enforcing against the landlord the rights which he had already sold." It is the law, that if the landlord, by any means, obtains absolute and clear possession of a holding, subject to the Ulster custom, free of and discharged from the claims of the out-going tenant, he has acquired that custom within the meaning of the Act. Then, if Mr. Ogilby did acquire that custom from the out-going tenants, I think, it was quite clear that he resolved never to create that custom again, and, I think, he did not do so. I shall, therefore, allow the claim for tenant-right, in respect of the original eight acres, so far affirming the Chairman's decree; but disallow the claim as to the remainder of the farm, which the tenant obtained (without any payment) from the landlord, who had long disallowed the custom in his time on the estate.

## NORRIS v. LAWRENCE.\*

*Claim for tenant-right at the end of a lease not sustained in evidence.  
Proof of custom from adjoining estates.  
Remittal to Court below of alternative claim.*

This was a claim for the benefit of the tenant-right custom, in respect of a farm of 87 acres, held under a lease dated 1791, for three lives, or 31 years, at a rent of 8 shillings per acre. The last life dropped in 1874. The claimant had in 1860 purchased the interest of the original lessee, for £600, there being then only one surviving life in the lease, aged 75. The landlord, on the expiration of the old lease, demanded a new rent of £3 per acre. Norris offered £1 per acre. Finally, the landlord proposed to take £127; the tenant offered £102, the fair rent found by Mr. Nolan, an experienced valuator. A claim was filed alleging a custom to continue in occupation after the expiration of the lease, at a fairly-valued rent; or if the landlord desired to evict the tenant, that he should be allowed to sell to a proper tenant at such fair rent, or else to obtain from the landlord the value of the tenant-right, as if so sold. The landlord disputed the existence of such a custom on the expiration of a lease. Evidence was given by the claimant to prove the existence of the custom alleged on several of the adjoining estates. Mr. Lawrence's estate was part of a larger (the Bristow) estate, and was purchased in 1835 by the respondent's father. The Bristow estate was originally part of the Earl of Antrim's estate. The Chairman found the rent demanded by Mr. Laurence unreasonable, held the custom proved, and awarded £800 compensation.

WHITESIDE, C.J., having referred to *M'Nown v. Beauclerc*, and the elaborate judgment of Barry, J. (*ante*, p. 227), and to *Johnston v. Torrens* (*ante*, p. 257), held that no evidence was given to prove the alleged usage either on the particular estate of the Bristows, or on the once great estate of the Marquis of Antrim, out of which the Bristow estate was carved, and the usage of which larger district might have been fairly applied to the divisions and sections into which it was divided. No satisfactory proof had been given of any sales by lessees at the expi-

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\* Derry Summer Assizes, 1875; before Whiteside, C.J.

ration of a lease, and before a new tenancy had been created on any of the estates in the district. There was no analogy in the case of *Stevenson v. Lord Leitrim* (*ante*, p. 341). The very object of the Land Act was to confer on the agricultural tenants of Ireland such a degree of certainty in tenure as would enable them to pursue their industry without dread of any sudden change, or any undue influence on the part of a landlord. How could that apply to a lease of 70 or 80 years, under which the holder could not get a notice to quit, who could not be disturbed, and who could not suffer from an increase of rent? There was nothing in the Act which expressly denied that the custom alleged might attach at the end of a lease, but there was nothing in the Act affirming that it did. The Act was not intended to apply to old leases, with covenants to surrender at the end thereof. He was of opinion the usage did not attach to this particular holding. He must reverse the Chairman's decree, and remit to the barrister the alternative claim under the other sections of the Act.

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#### MAGEE v. MARQUIS OF BATH.\*

*Lands, anciently subject to the Ulster tenant-right custom—part of an estate on which the custom was observed from 1851 to 1860—were in the famine years surrendered by the tenants, who left while owing arrears of rent, and were assisted by the landlord to emigrate. They were subsequently, in 1859, relet by the landlord, who had occupied them in the interval, to a tenant who undertook to erect a dwelling-house on the lands.—Held, that the reletting was subject to the Ulster tenant-right custom.*

FITZGERALD, J.—In what was called the “bad times” the tenants abandoned the possession, owing some arrears, and some were assisted to emigrate. The lands remained in Lord Bath's possession for some time, until they were let to a man named Gilmour in 1857. He too abandoned their possession in 1858, owing some arrears. The letting to the present claimant took place in 1859. It was on those circumstances that the Marquis of Bath rested his case of the acquisition of the tenant-right. It was urged that the landlord, having thus got

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\* Monaghan Summer Assizes, 1874; before Fitzgerald, J., 8 I. L. T. R., 219.

possession free of any tenancy or claim, had acquired from the tenant the tenant-right custom, and that thenceforth the holding—that is the parcel of land—ceased to be subject to it. Whether there was such an acquisition as would come within the meaning of the statute may be doubted. The section of the Act would seem to have reference to cases where the landlord had purchased up the tenant's interest, with a view to extinguish the usage. On this I express no opinion. I am unable to adopt the reasoning on the subject of the Chairman of the County Antrim, in *Williamson v. Lord Antrim* (*ante*, p. 307), or of Mr. Butt in his book on the Land Act, pp. 577, 579. I should reserve the question, if it arose. ( I have no doubt as to one matter of fact, and that is, that whenever it comes to be investigated, it will be found in multitudinous cases that, where, before the passing of the Land Act, the land had come into the possession of the landlord free from any tenancy or claim, and was relet by him, the new letting was considered to be subject to the usage, and treated and dealt with accordingly. As the dealings by which the landlord is said to have acquired the tenant-right, as well as the letting to the claimant, took place before the passing of the Land Act, there can be no doubt that in one sense the land, when it came into the landlord's hands before the letting to the claimant, was not then subject to any custom or usage, for the custom was then merely a moral obligation, enforced by the pressure of public opinion. But it seems equally clear that on a new letting, before the passing of the Land Act, the landlord might expressly recognize the usage, such as it was, or the new letting might be entered into under such circumstances as by fair implication to be subject to the usage existing on the estate, whatever force it might have. The question I now propose to consider as a question of fact is, whether the letting to the claimant in 1859 was, by fair implication, excluded from or included in the usage of tenant-right then prevailing on the estate. The usage prevailed generally on the estate. From 1857 to 1860 the usage did not prevail. It was permitted again in 1860. It was, before the Act, at the will of the landlord, and was the creature of his pleasure. It existed before the "bad times," but in these years of distress it ceased to be of any value. The under-agent stated that the difficulty in those days was, not to get purchasers of tenant-right, but to get solvent tenants. There was, he said, a large tract of land, of about 6,000 acres, on which there were no tenants. The claimant came from a neighbouring county and a different estate, where he had held a farm, and, I suppose, disposed of it in the usual way. He came to a county where tenant-right pretty generally prevails, and to take lands which had been actually subject to it. He agreed to become tenant in 1859. By the agreement which was signed on the occasion, Magee undertook to pay a

year's rent, not as arrears, and that he should expend £100 in erecting a dwelling-house. It seems from this that the tenant was to pay a fine or purchase money. He was to pay the entire year's rent of 1858, not as arrears, for the land had been in the hands of the Marquis of Bath for the year. If he came in as an ordinary yearly tenant, there was no reasonable ground for asking him to pay the previous year's rent, which was not arrears, nor would it be reasonable to ask him to put himself under the obligation to pay £100, to be applied in erecting a house on the farm. I presume the house already upon it must have been considered unsuitable for the residence of a tenant. It appeared further, that he was to come in under the ordinary rules of the estate. If it was intended that this holding was not to be subject to the ordinary custom of the estate, Mr. Trench, the then agent, should have so informed the tenant. In the lamented absence of Mr. Trench we are left to draw an inference, and the inference which I deduce is, <sup>in the case</sup> that Magee was led to believe, and did believe that he was accepted as tenant in the ordinary way, with the benefit of the custom then prevailing generally on the estate. Nothing has since happened to deprive the tenant of his rights under the said custom, which since 1860 no longer depends on the will of the landlord, but is enforceable by law; and I shall award him compensation under the custom, but reduce the amount fixed by the Chairman.

#### LAPPIN AND LITTLE v. COOTE.\*

*On an estate where the custom is that the sale should be with the consent of the landlord or his agent, who fixes the price and selects the incoming tenant, a tenant sold to an adjoining tenant, notwithstanding notice by the agent that the sale would not be permitted.*

*Held, that neither the outgoing nor the incoming tenant could sustain a claim under the Ulster custom.*

The facts sufficiently appear in his lordship's judgment:—

FITZGERALD, J., held that the custom to which this holding was subject was one of sale, but not without the consent of the landlord or his agent, who fixed the price and selected the incoming tenant. Lappin parted with his interest to the other claimant, Little, and thereby ceased to be tenant, and therefore he could have no claim. Little bought

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\* Monaghan Summer Assizes, 1874; before Fitzgerald, J.; 9 I. L. T. R., 72.

after being distinctly informed by the agent that he would not be recognized as tenant without the previous approval of the landlord or his agent. Notwithstanding this notice, he persisted in purchasing. To sanction this would be to deprive the landlord of his rights under the Ulster custom. The Chairman's decree must therefore be reversed. At the same time, as the question was important, he was willing to reserve a case for the Court for Land Cases Reserved.

No case was, however, reserved, the parties having arrived at a settlement.

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### HILLOCK v. COPE.\*

*A purchaser at a sheriff's sale of a holding subject to the Ulster tenant-right custom, on an estate where sales by auction are not permitted, and where the landlord has the right of selecting the purchaser, violates the custom, and is not entitled to compensation under the custom.*

The facts appear in his lordship's judgment :—

PALLAS, C.B.—Samuel Reilly was, until December, 1873, the tenant of the holding in respect of which compensation is now claimed under the Ulster Tenant-right custom. At that date his interest was sold by auction by the sheriff, under an execution issued upon foot of a judgment obtained by the claimant, Mr. Hillock. Previous to the sale the sheriff was served with a notice by Mr. Winder, the respondent's agent, that the custom of the estate did not admit of a sale by auction of a tenant's interest, nor the admission of any new tenant without the sanction of the landlord. At the auction one person offered £10 an acre for the tenant-right, upon the condition that the sheriff should assure him that he would be accepted as tenant by the landlord. The sheriff declined to do so, the bid was withdrawn, and ultimately Hillock, the claimant, was declared the purchaser at £5. By deed, the sheriff assigned the holding to Mr. Hillock, who afterwards paid to Mr. Winder an arrear of rent which had accrued due previous to the sale. The arrear was accepted; but Mr. Winder refused to accept or acknowledge Mr. Hillock as tenant, or to permit him to sell the holding. A notice to quit was served prior to May, 1874, on the expiration of which an ejectment was brought by the landlord, and a decree for possession pronounced, and duly executed.

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\* Armagh Spring Assizes, 1875; before Pallas, C.B.; 9 I. L. T. R., 77.



The usage relied on by the claimant was as follows :—That the landlord was bound to accept any solvent tenant to whom he should not make any reasonable objection, and he contended that the mere fact that a solvent person willing to become tenant had been selected by the out-going tenant because he was the purchaser at an auction, was not, *per se*, a reasonable ground of objection. If such a usage had been proved, and the question to be determined were that which I have mentioned, I should have reserved the case for the Court for Land Cases Reserved. But the usage alleged was disputed, and the case turned solely upon the nature of the usage—a question entirely of fact—which could not with propriety be reserved. I have arrived at the following conclusions of fact :—Firstly, that the usage to which the holding in question was subject was not one under which the landlord was bound to accept any solvent tenant to whom he should not make a reasonable objection, but one under which he was entitled to select the person who was to become the new tenant, subject to the obligation of so exercising the right of selection as not to prevent the fair value of the tenant-right being obtained. Secondly, that sales by auction were not permitted. It appears to me that it would be difficult that an unrestricted right to sell by auction should co-exist with a usage which gave a landlord a voice in the selection of the new tenant.

I apprehend that there can be little doubt as to the legal effect of the acceptance by the landlord, under the Ulster custom, of a new tenant. It operates as a surrender of the interest of the original tenant, and the creation of a new tenancy between the landlord and the incoming tenant. Although the new tenant in fact purchases the tenant-right from the outgoing tenant, the interest which he acquires is derived, not through assignment from the old tenant, but through the creation by the landlord of a new interest. This portion of the usage would, *prima facie*, appear to show that the tenant-right interest did not necessarily pass by an assignment of the farm. There is no question that a tenancy from year to year is legally assignable, although the holding may be subject to a tenant-right custom. But to hold that the assignee by deed of a yearly tenant was entitled, merely because he was assignee, to the tenant-right, would be to force upon the landlord a new tenant, of whom he had not approved. This would have been contrary to a portion—and to what I hold to be a material portion—of the usage. I have, therefore, arrived at the conclusion that, except in the case of the death of a tenant (a case as to which I desire to guard myself against expressing any opinion), the only person entitled to the tenant-right interest, under the usage to which the holding in question has been proved to be subject, is the original tenant. The 1st section of the Act 33 & 34

Victoria, cap. 46, enacts "That the usages prevalent in the province of Ulster are hereby declared to be legal." The question, whether the case is one in which a right to sell or to receive compensation existed, must be determined by the usage, as if the Act had not been passed. I am satisfied that, according to the usage, the assignee by deed of a yearly tenant was never recognised by the landlord; that the successive surrenders of the tenancies of the outgoing tenants, and the successive creations of new tenancies between the landlord and the purchasers of the tenant-right, was an essential part of the usage, and that the relation which from time to time subsisted between the owner and occupier of the land was that of landlord and tenant created by original contract. Of the many arguments which were so ably addressed to me, in support of the claimant's case, I shall advert to but two. First, it was argued, and no doubt correctly, that the assignment by the sheriff of the interest of an execution-debtor in a tenancy from year to year, or a term of years, held under an instrument containing a covenant not to alienate, was not, in general, a breach of such covenant, and the well-known distinction of the common law between voluntary and involuntary alienations was much relied on. This argument, if pushed to its full length, means this:—Assume that, according to the custom, alienation by a tenant was forbidden—this provision of the custom cannot have greater effect than a similar clause in a lease; but, alienation by a sheriff would not be a breach of the covenant in the lease; therefore it is not alienation within the meaning of the custom. This argument is grounded on a fallacy. An involuntary alienation is not, in general, a breach of a covenant against alienation, because the word "alien" in such a covenant is usually, as a matter of construction, held to be "voluntarily alien;" but it is not pretended that, if the words of a covenant clearly referred to involuntary as well as voluntary assignments, an assignment by the sheriff would not be a breach. But in a case in which our task is not to deal with the construction of a written instrument, but to ascertain, by extrinsic evidence, the material incidents of an existing usage, surely we must examine the usual course of dealing, and from it, and not from the legal effect of any technical words, ascertain what is the true nature of the usage. I entertain no doubt that it was not part of the usage that a purchaser, at a sheriff's sale, was entitled to force himself upon the landlord as his tenant. Not only was such a thing never attempted, but it would have been inconsistent with the well-proved and persistent usage of preventing sales by auction, and also with that portion of the custom which gave the landlord a voice in the nomination of the new tenant.

The second argument to which I would advert is, that no evidence

has been given that a breach of the custom, by attempting to sell by auction, would work a forfeiture of the tenant-right. Indeed, this point may be put a little stronger for the tenant, for I think that the substance of the evidence which was given upon the last day amounted to this, that the attempted sale by auction was treated by the landlord as a nullity. In *Friel v. Lord Leitrim* (*ante*, p. 335), which was before the Court for Land Cases Reserved, a majority of the Court were of opinion that where there had been a sub-letting, contrary to the usage, such sub-letting did not afford an answer to the claim for compensation, in the absence of evidence that, according to the usage, the tenant-right was forfeited by such sub-letting. If this were a similar case, I should of course follow *Friel v. Lord Leitrim*; but there the claimant was the original tenant, who, according to the usage, was a person entitled to claim compensation. The *ratio decidendi* was that when the general custom was proved, under which the claimant was *prima facie* entitled, it lay upon the respondent to make a complete defence, and that, to constitute such defence, a breach of the custom was not sufficient; it should be such a breach as, under the usage, would forfeit the right to compensation. To render that case applicable, the claimant here should have been, not Hillock the purchaser, but Reilly the original tenant. I will, of course, be distinctly understood as not indicating any opinion that such claims could be sustained by Reilly. That question is not before me, and I refer to it merely to show the non-applicability of *Friel v. Lord Leitrim*. The present claimant is a person who, according to the custom, was not entitled to claim compensation. As far as his claim is concerned, it is immaterial whether the right to compensation is absolutely forfeited or is existing in some other person. Upon these grounds, and basing my judgment exclusively upon the conclusions of fact at which I have arrived, I hold that, under the usage existing upon this particular estate, the present claim cannot be sustained. The dismissal of the learned Chairman must, therefore, be affirmed, and the claim dismissed with costs.

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MOODY v. ROTTEN AND LANE.\*

*Where a tenant of a holding subject to the Ulster tenant-right custom is served with a notice to quit in order to enforce payment of an increased*

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\* Armagh Spring Assizes, 1875; before Palles, C.B.

*rent, the Court has only power to determine whether the proposed increase is reasonable, and to award compensation, but cannot, without the consent of both parties, fix what is a reasonable rent.*

Moody's claim was one for £430, compensation under the Ulster tenant-right custom in respect of a farm of 22 acres, valued under the Tenement Valuation at £13 without the buildings, at £14 5s. with the buildings; and was held under a yearly tenancy at the rent of £10 4s. The landlord claimed an increased rent of £16 4s.; and to enforce its payment, served notice to quit—on which the claim arose. The respondents disputed the claim on the ground that, before the act of disturbance mentioned in the claim, they offered to permit the claimant to continue in occupation at a fairly valued rent, and upon just and reasonable terms, and the tenant had refused the same. The Chairman had, with the consent of both parties, as he thought, but without the consent of the respondents, as was alleged by them on the appeal, fixed the rent at £14.

The respondents appealed.

PALLES, C.B.—Since 1844 there had been no increase of the rents on the Slacke estate, of which the respondents were trustees. It was admitted that under the Ulster custom there was a right to increase the rent, provided the increase should not encroach upon the tenant-right. It was admitted that there was an increase in the value of land since 1844, entitling the landlord under the custom to increase the rents. The respondents were trustees, and it was their duty to their *cestui que trusts* to enter upon a new valuation after such a lapse of time. They employed Mr. Leonard, and expected his valuation would be reasonable and proper. They adopted his valuation, and demanded from the tenants the increased rents fixed by him. The tenants considered the valuation too high, and refused to pay the increased rents. A notice to quit was served, accompanied by a notice intimating that the notice to quit was served to enforce the payment of the increased rent. A decree was obtained for possession, and the claim was served under the Land Act. When the claim came before the Chairman, the respondents said they were willing to continue the tenants at the rents demanded, and the tenant was willing to continue at the rent he considered fair. The Chairman entered into the inquiry, what was a fair rent. It was stated in the order that the tenant had agreed to that inquiry, but there was no statement in that order that the landlord consented. Finding no such consent I must assume

that the Chairman acted without any such consent. I am of opinion that the Chairman had no jurisdiction without the consent of the landlord to determine the terms of the tenancy to be entered into. He entered into it with the best and the kindest motives to amicably settle the differences between the parties. Having the same desire, but declining to act on a jurisdiction not open to me, I have no course open to me but to reverse the decision of the Chairman, and I shall remit the claim to the Chairman for adjudication on the question of compensation. If the result of that hearing shall be a dismiss of the tenant's claim, let him abide his own costs of the former hearing ; if a decree shall be granted in the tenant's favour, let him have his own costs of the former hearing, and of this appeal.

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CLARKE v. ROTTEN AND LANE.\*

*Where the rent demanded is under the Ulster tenant-right custom unfair, the Court will award compensation.*

This was a similar claim to that of Moody against the same respondents, and arose under similar circumstances. The Chairman awarded £150 compensation. Both parties appealed.

PALLES, C.B.—In this case, the respondents objecting to the Chairman fixing the rent, the latter, acting in strict conformity with the law, gave a decree for compensation. Both parties have appealed from his decision. The question is whether the rent demanded is reasonable, having regard to the circumstances of the estate and the admitted existence of the Ulster custom. If the new rent demanded is fair, there is no breach of the tenant-right custom ; but if it is too high, there has been a breach. The Chairman had no right to fix any intermediate sum between the old rent and the new, and the only matter I have to consider is whether the rent demanded is or is not fair under the custom. The acreage of the farm is 20a. 3r. 15p., and the rent paid was £14 4s., and the new rent demanded is £19 19s. The rent demanded is too high. It was fixed on Mr. Leonard's valuation. I was astonished that Mr. Leonard stated he had made a fair valuation when he assumed the tenant-right to be value for only £5 an acre. He had no more right to make that assumption than he had arbitrarily to assume any other element in the

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\* Armagh Spring Assizes, 1875 ; before Palles, C.B. ; 9 I. L. T. R., 95.

calculation. Holding, as I do, without the slightest doubt that tenant-right on this estate is not limited to £5 an acre, I must hold that the rent demanded is not a fair rent, having regard to the custom. There has, therefore, been a breach of the custom, and the only matter I have to decide is the amount of compensation. I am loath to differ from the Chairman; but a state of circumstances existed which might lead the tenants to think that only the question of rent would be entered into before the Chairman. I have a mass of testimony before me that was not before the Chairman, and on this evidence, as a whole, I have decided to allow the claimant £220.

The claimant's appeal will be allowed, without costs; and the respondents' appeal dismissed, with costs.

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DONNELLY v. SHIELD.\*

*A tenant who parts with his interest in his farm without the landlord's consent—the custom of the estate being that the landlord should have a voice in the selection of the incoming tenant, and that an adjoining tenant should have the preference—disentitles himself to the benefit of the custom.*

This was an appeal from the decision of the Chairman, who had dismissed the claim, which was one under section 1 of the Land Act. Donnelly, the appellant, in consideration of certain payments, obtained from his brother a farm in Donaghinie, held by the latter under a tenancy from year to year. This transfer was not acknowledged by the landlord, being, as alleged, contrary to the custom of the estate; and a notice to quit was served. The respondent contended that the custom of the estate was, that if a tenant wished to part with his farm, he should first obtain the consent of his landlord, and then proceed to sell by private sale to the adjoining tenant, the purchase-money, if the parties disagreed, to be settled by arbitrators appointed for the purpose. If the adjoining tenant could not purchase the farm, others got an opportunity of doing so; but a preference was given to a resident on the estate. The appellant contended that the custom of the estate was to sell

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\* Omagh Summer Assizes, 1874; before Fitzgerald, B.

to the highest and best bidder, if the purchaser was a solvent person, and approved of by the landlord. The Chairman dismissed the claim on the ground that the custom proved was one of sale with the approval of the landlord—the adjoining tenant, if able and willing to purchase, having the preference; and that this custom had been violated by the present claimant.

FITZGERALD, B., held that the claimant had failed entirely to prove the existence of the custom which he alleged. A custom there was of some kind, and plainly the landlord had a right of insisting that the adjoining tenant or tenants should get the preference as purchasers. The tenant in this case had acted in defiance of the landlord. He would not like to determine what the custom of the estate was, but plainly the landlord had a voice in the matter. If the custom was enforceable, it must be enforced against the tenant as well as the landlord. The tenant in this case transferred his interest without giving the landlord an opportunity of approving of or objecting to the incoming tenant. He must dismiss the appeal with costs.

His lordship refused an application to remit the case to the Chairman on the alternative claim for improvements.

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MARY and W. H. BYRNE v. EARL OF ARRAN.\*

*Purchase of the Ulster tenant-right custom. Letting wholly or mainly for the purposes of pasture.*

The claimant, Mary Byrne, wife of Wm. H. Byrne, the other claimant, was administratrix of John H. Dillon, an hotel-keeper in the town of Donegal, who died in July, 1872, intestate. In 1846 one Rutherford surrendered the lease of his farm to the Earl of Arran, receiving an annuity of £40. John H. Dillon then became tenant of this farm, with the exception of a few acres which were given to another tenant, named M'Loone. The Earl of Arran also paid the interest of a considerable sum of money, borrowed from the Board of Works, which had been spent in improving the farm. The respondent, on Dillon's death, demanded

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\* Lifford Summer Assizes, 1875; before Fitzgerald, B.

an increase of rent from the claimants, and also required them to reside on the premises. Mr. Byrne was an architect residing in Dublin, and refused to reside, or to pay the rent demanded. A notice to quit was served, whereupon a claim was made under the Ulster tenant-right custom. On behalf of the respondent it was argued that though the custom prevailed generally on the estate, the landlord had in respect of this farm, by the transaction with Rutherford, acquired the Ulster tenant-right custom; and that the letting to Dillon was a letting exclusive of the custom. The Chairman held that the surrender of the lease by Rutherford was not an acquisition by the landlord of the tenant-right custom so as to deprive the tenant of the benefit thereof; but held that the holding was let as a grazing farm, and inasmuch as the tenant did not reside on the same, nor was it adjoining or ordinarily used with the holding on which he resided, that he was not entitled to compensation under the 15th section of the Land Act. An appeal was taken by the claimant. On the appeal evidence was given on behalf of the claimant that a large portion of the farm was used for tillage; and a draft lease was produced, which was tendered to Dillon in 1846, but which he refused to sign, on the ground that he objected to the covenants it contained as to the mode of cultivating the farm. It also contained a covenant to grind the corn grown on the premises at a particular mill.

FITZGERALD, B., held that it was the interest of Rutherford under the lease, and not the Ulster tenant-right custom, which was purchased by the landlord; that the farm was not let to Dillon to be used wholly or mainly as a pasture farm; that, in the correspondence between Mr. Byrne and the respondent, the latter had acknowledged the existence of the tenant-right custom; and he reversed the dismiss, and decreed for £400 and costs.

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#### BROWNE v. BRUCE.\*

*Restrictions on the tenant-right custom previously existing, put in force since 1862, held not binding.*

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\* Londonderry Summer Assizes, 1874; before Fitzgerald, B.



This was a claim for compensation under the Ulster tenant-right custom, on which the Chairman had awarded Wm. Browne, the claimant, £250 (*post*, p. 511). From that decree the respondent, Sir. H. Hervey Bruce, appealed. The estate, of which the holding in question formed a part, had been three years previously purchased by the respondent from the Clothworkers' Company of London. The claimant was eighty years of age, and had been reared on the farm. No sale of the farm took place within living memory. A number of witnesses proved that from the year 1844 down to the present time, various farms on the estate of the Clothworkers' Company were purchased and sold without any restriction as to the amount of purchase money. It was also proved that Sir Hervey Bruce bought up a piece of ground in the year 1872 from one of the tenants, and that he gave as much for it as the tenant could have obtained from any of the other tenants. On cross-examination the witnesses admitted that they had heard, after the appointment in December, 1859, of Captain Stronge to the agency, that compensation for tenant-right would be restricted to five years' purchase, but they denied that any agreement to that effect had ever been signed by them, or that a notice of the reduction in the amount to be given to the outgoing tenant had been served upon them.

For the landlord, it was contended that the Clothworkers' Company had restricted the tenant-right to five years' purchase of the rent; that a document (which was produced) had been extensively circulated among the tenantry for the purpose of giving them to understand that they would not have the right to let, sub-let, or assign; that in the year 1841 the Company passed a resolution to the effect that tenants, on giving up possession or quitting their respective holdings, would get compensation for their improvements, such compensation to be measured by the agent; and that when Captain Stronge was appointed agent, as successor to Mr. Knox, the Company resolved to restrict the tenant-right to five years' purchase as a maximum, and any sales that afterwards took place under any other arrangement were purely exceptional in their nature, and not in any way binding on the Company.

Mr. M'Killop, the present agent of the estate, and Capt. Stronge, on examination, stated that the Clothworkers' Company would not as a rule allow more to outgoing tenants than five years' purchase.

The last-named witness stated that from the year 1862 he had trouble in persuading the Company to allow in some cases the five years' purchase, and, according to his opinion, the Company desired to get rid even of this limited custom, and have complete control of the estate. Captain Stronge also explained the circumstances under which several outgoing tenants were by reason of peculiar circumstances permitted to sell by auction. These cases, however, were exceptional.

FITZGERALD, B.—I see no reason for reserving my judgment in this case, for, on one most important point, I have no doubt at all—namely, that tenant-right, of some kind or other, existed on this estate; and the real question is, what was the nature of the custom existing at the time the Land Act was passed? Was it the custom to permit unrestricted right of sale or was there a modification of that right? That tenant-right was recognised from the year 1843 up to the year 1859 I have no doubt. The agent himself did not deny that sales took place. Then I have, I think, clear evidence that the custom existed in the largest condition from the year 1843 down to 1859, and the question is whether the practice of restricting the tenant-right, which was not, at all events, attempted to be put in force prior to the year 1862, had the effect of modifying the principle of the previous custom. I am not satisfied that it had, and, therefore, I affirm the decision of the Chairman.

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COLBERT v. STUART AND ATKINSON.\*

*Estate rule limiting compensation.*

*Apportionment of amount awarded under Ulster Custom.*

The Chairman had granted a decree for £300 as the value of the tenant-right of a mountain farm, part of the Verner estate, of which the respondents were trustees, held at a rent of £11. The claimant, Mary Colbert, gave possession to her son John of two-thirds of the farm, and he paid two-thirds of the rent. Mr. Crossle, the agent, was willing to accept him as tenant for the whole farm, reserving certain rights for Mary, but she would not give up possession. The farm could not be divided, and hence the

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\* Omagh Spring Assizes, 1875; before Deasy, B.

service of the ejectment. The agent deposed that the custom on the estate was, that when a tenant was parting with his holding, he should receive ten years' rent. This amount was about ten years ago but five, and was then increased to ten years' rent. That amount was supposed to include an allowance for buildings, except in extreme cases of improvement, when the amount was settled by arbitration.

DEASY, B., held that the latter custom was proved, and reduced the decree to £120, apportioning two-thirds thereof to John, and one-third to Mary Colbert.

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M'SORLEY v. CHARLTON.\*

*Evidence of leasehold tenant-right.*

*Referring to the Chairman claim for improvements on dismissal of claim under the custom.*

This was a claim for tenant-right, consequent on ejectment at the determination of a lease for 21 years. From the evidence given at the Land Sessions, the Chairman concluded that the custom obtained in such cases, and awarded compensation.

DEASY, B., held that there was no evidence before him to show that any tenant got money from the landlord or from any other person for giving up possession at the determination of the lease. He would, therefore, reverse the decision of the Chairman, and dismiss the claim.

An application was made to remit to the Chairman the alternative claim for improvements.

DEASY, B.—I find that Judge Keogh in a similar case, *Burns v. Ranfurley*, ante, p. 206, wherein the claimant had been allowed £300 as the value of the tenant-right, reversed the decision, and remitted the case to the Chairman for his decision on the alternative part of the claim. I shall follow that precedent, and therefore make an order to reverse the decision of the Chairman with costs, and refer back to him the alternative claim for improvements.

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\* Omagh Spring Assizes, 1875; before Deasy, B.

## WRIGHT v. MONTGOMERY.\*

*Right to proceed on alternative claim after failure to prove custom.*

The claim was under sec. 1 ; and, in the alternative, under sec. 4.

The claimant having failed on appeal to establish her claim under the tenant-right custom,

FITZGERALD, J., ordered that the claim be dismissed, but without prejudice to any application the claimant might be advised to make to the Court below for leave to amend her notice of claim or to lodge a new claim.

The CHAIRMAN gave liberty to the claimant to file an amended claim by inserting a new claim for compensation for disturbance under sec. 3, in addition to the claim under sec. 4.

## SHANNON v. EARL OF DARTREY (No. 1.)†

*No jurisdiction to hear appeals, on consent, where ten days interval has not elapsed from termination of Sessions.*

The Assizes began within ten days from the termination of the ordinary Sessions. The parties, however, consented to its being heard at the present Assizes.

FITZGERALD, J., held that under Rule 39 (Part I. of Land Act) he had no jurisdiction to hear the appeal.

## KANE v. RANKIN.‡

*Form of decree under the Land Act.*

In this case the Chairman had made the following order, from which the respondent appealed :—

“ Let the claimant proceed to sell by public auction or otherwise, as he may be advised, his interest in the farm, subject to the

\* Down Summer Assizes, 1874; before Fitzgerald, J.

† Monaghan Summer Assizes, 1874; before Fitzgerald, J.

‡ Derry Spring Assizes, 1874; before Whiteside, C.J.

tenant-right custom under which he holds, but subject to re-valuation according to the custom of the country, and to such increased rent as the farm is reasonably liable to bear, so as it shall not be, or operate as, a violation or evasion of the tenant-right, known as the Ulster tenant-right custom. All arrears of rent, at the rate of £33 16s. 7d. to be paid and discharged before respondent is called upon to accept the new tenant. Let this case stand for Mr. Nolan."

WHITESIDE, C. J., remitted the case to the Chairman, in order that he should himself determine the amount of compensation to be awarded the claimant. The order ran as follows :—"The Judge of Assize, at a court held in Londonderry, on the 12th of March, 1874, after hearing and considering the matter in this appeal, orders that the case be remitted to the Chairman of the said County of Londonderry, that he may proceed to hear and determine the same in accordance with the provisions of the statute."

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SHANNON v. EARL OF DARTREY (No. 2.)\*

*A decree not fixing the exact amount of compensation awarded, cannot be heard on appeal.*

The Chairman had made a decree for tenant-right compensation at the rate of £10 per acre, without stating the acreage, or the gross amount of compensation.

FITZGERALD, B., held that the decree was not final, and remitted the case to the Chairman to fix the amount of compensation.

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SHANNON v. EARL OF DARTREY (No. 3.)†

*Limitation of the price of the tenant-right, enforced for 27 years, and well known to the tenants, forms an usage legalized by the Act.*

The question was whether, as alleged by the respondent, the tenant-right was limited to £10 per Irish acre. The Chairman had decreed at this rate.

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\* Monaghan Spring Assizes, 1875; before Fitzgerald, B.

† Monaghan Summer Assizes, 1875; before Lawson, J.

LAWSON, J.—The rule on the estate, which appeared to be perfectly well known, was £10 an acre. Mr. Murray-Ker had been agent for 27 years, and during that time he carried out the rule as far as he was able. It was not a new arrangement, but an established custom; and he would therefore affirm the Chairman's decree with costs.

The respondent applied to dismiss the claim altogether, on the ground that the claimant had failed to establish the custom alleged by him.

LAWSON, J., refused to do so. There was a custom proved, and the claimant was entitled to the benefit of it.

The respondent asked his lordship to deduct the costs of the ejectment.

LAWSON, J., declined to do so.

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#### KILPATRICK v. MONTGOMERY.\*

*Compensation under the tenant-right custom allowed to tenant coming into possession without incoming payment—the dealings of the landlord proving an admission of tenant-right.*

The claimant was in possession of two holdings, one known as the Old Farm, and the other as King's Farm. In 1864 King, one of the respondent's tenants, left the neighbourhood, and possession of the farm which he occupied was given to the respondent, at an increase of £2 in the rent. In 1872 Kilpatrick was noticed to quit the Old Farm. Accompanying that notice was another document, stating that the object of the notice to quit was to have the rent adjusted. Some time afterwards an amicable arrangement was arrived at, and the proceedings terminated. After some time a notice to quit King's farm, possession of which respondent had obtained in 1864 without fine, was served, and a decree was obtained for possession the right of sale being reserved to the claimant, at a rent to be fixed by arbitrators named at Quarter Sessions, with liberty to call in an umpire. The umpire fixed the rent at £14 5s.

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\* Omagh Spring Assizes, 1875; before Deasy, B.

The claimant sold at that rent for £140 to one M'Nickle, who would not be accepted as tenant. The Chairman decreed for the amount offered by M'Nickle.

The respondent appealed on the ground that the claimant had obtained possession without incoming payment, and that the rent fixed by the umpire was too high, and consequently the compensation excessive.

DEASY, B.—It is admitted that tenant-right prevails on this estate, and I have not heard any evidence to show that the amount of the tenant-right is limited to any particular number of years' purchase. According to the statement of Mr. Montgomery, when he offered to let the farm at £18 rent, he was offered £90 fine, and, therefore, I cannot hold that the sum awarded, which was based on the selling value at the rent fixed by the umpire, called in by the arbitrators, was too much. That being so, I affirm the order made by the Chairman.

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#### O'BRIEN v. SCOTT.\*

*A landlord, capriciously refusing to accept a purchaser of a tenant-right interest, is bound to pay compensation.*

The claimant, O'Brien, purchased the interest of one M'Nulty; but would not be accepted as tenant by the landlord, who offered to repay him the amount he was out of pocket, and at the hearing of the appeal continued this offer.

WHITESIDE, C. J., expressed his disapproval of the conduct of the tenant; and whilst giving a decree for the amount offered by the landlord, less costs, said:—"When a tenant desires to sell, his course is to write a letter to the landlord, or go to him and say—Here is John Brown, a neighbour of mine, an honest respectable man, I wish to sell to him. And then, if John Brown is that honest respectable man, and the landlord capriciously refuses to accept him, and the custom is proved to exist, I would decree against the landlord. But the landlord should have the right of choosing his tenant. Transfers of tenancies should not be made behind his back, without his knowledge of what is being done."

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\* Omagh Summer Assizes, 1875; before Whiteside, C.J.

## TURNER v. NOBLE.\*

*A small estate, surrounded by estates on which the custom prevails, must be presumed to be subject to the same custom, in the absence of proof to the contrary.* •

This was a claim under the Ulster tenant-right custom. The respondent in 1864 purchased a townland, part of an estate, on which there was no restriction on the amount of sale under the custom. He stated that since the date of his purchase he had permitted no sales; and that during the time of the previous agent, Mr. Stanley, 1850 to 1864, there were no sales on this townland. Previous to and since 1864, the custom was freely allowed on the other townlands of the same estate.

MORRIS, J., held the custom established. Tenant-right existed in all the surrounding district. The respondent had failed to prove that his little estate formed what the respondent deemed an oasis in a tenant-right country. He would require some distinct proof to the contrary before he would hold that an isolated townland was not subject to the custom which prevailed on all the neighbouring estates.

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M'SHANE v. SHEIL.†

*Where the Ulster tenant-right custom is admitted, the landlord assenting to a right of sale, but only subject to a condition that the purchaser should sign an agreement of tenancy inconsistent with the custom, is unreasonable conduct on the part of the landlord.*

The Chairman made a decree for £250. Mr. Sheil, the respondent in the court below, appealed. He admitted the existence of the custom on his estate, but contended that, having frequently requested the claimant to sell, even after the service of the notice to quit, and the claimant never having offered a tenant, the privilege of sale had lapsed, and he was not entitled to recover

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\* Armagh Summer Assizes, 1875; before Morris, J.

† Omagh Summer Assizes, 1875; before Whiteside, C.J.



compensation. On behalf of the claimant it was shown that he had tried to sell the farm by private proposal, and that two solvent persons had offered to purchase it—one at £299, and the other at £280. These tenders were sent to Mr. Newton, the agent, but it subsequently transpired that the incoming tenant would be obliged by the landlord to sign an agreement inconsistent with the Ulster custom, and the sales went off.

WHITESIDE, C. J., did not think the tenant had done anything to disentitle him to compensation. He was of opinion that any incoming tenant might be fairly alarmed at being asked to sign the agreement which the appellant had drawn up, and which was produced in the case. The notice offering the farm for sale was proper and becoming, and it was the best thing the tenant could do to get a solvent purchaser. He was, therefore, obliged to say that the conduct of the tenant was fair and reasonable; and, having regard to the Act of Parliament, he thought the conduct of the landlord was hardly what it should have been. That being so, and there being no dispute with reference to the value of the farm, nothing remained but to affirm the decree.

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POWELL v. ROTTEN AND LANE.\*

*Form of order for limited administration.*

The Chairman had decreed compensation. The respondents appealed. The claimant died intestate while the appeal was pending. Application was made to his lordship to appoint a limited administrator under section 59 of the Land Act, and that the case might be allowed to proceed.

PALLES, C.B., made the following order:—"Counsel appearing for the claimant, one of the sons of the deceased claimant, James Powell, who died since the hearing of the claim; and on reading the affidavit of James Powell, the younger, it is ordered that the claim be proceeded with, notwithstanding the death of the claimant, and that James Powell, the younger, be at liberty to proceed with the appeal, and to support

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\* Armagh Spring Assizes, 1875; before Palles, C.B.; 9 I. L. T. R., 96.

the decision of the Chairman so far as it is appealed from by the respondents, and let the compensation (if any) awarded, be paid to the personal representative of the deceased."

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BARRON v. STEPHENSON.\*

*The Landed Estates Court conveyance is conclusive in a Land Court, as to the tenancies specified therein.*

This was a claim for improvements effected on certain lands leased for three lives in 1801 by Mr. Wyse to Margaret Longan. In 1833, two of the lives being still in being, the lands were leased to Robert Sargent for these two lives and the life of Catherine Longan, afterwards Mrs. Barron, mother of the claimant. A trust was at the same time declared by Sargent for the benefit of Robert Longan, the son of Margaret, the lessee in the lease of 1801. Robert Longan was then in possession of the lands. It was also agreed that the new should not operate as a surrender of the old lease. On Robert Longan's death, Catherine Longan entered into possession, married, and surviving her husband, died in 1874. On her death ejectment was brought. The reversion was in 1871 sold in the Landed Estates Court, the schedule in the conveyance stating Sargent to be the tenant under the lease of 1833. No reference was made in the conveyance to the lease of 1801 or the declaration of trust. The last life in the old lease dropped in 1869. On a claim for compensation for improvements, proved to have been made prior to the execution of the lease of 1833, the Chairman dismissed the claim, holding first, that 34 & 35 Vic., c. 92, saved the claim for compensation in respect of these improvements, although not referred to in the conveyance; and second, that Catherine Longan, through whom and as whose representative, the claimant claimed, was not a successor in title to Robert Longan. An appeal was taken.

DOWSE, B.—This case is a plain one. It is not, in my opinion, possible to go behind the Landed Estates Court conveyance, in order to raise up a tenancy not specified in the schedule. I shall not reserve a case; and I affirm the dismiss.

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\* Waterford Summer Assizes, 1875; before Dowse, B.; 9 I. L. T. R., 145.

*In re Estate of DOMVILLE.\**

*Occupying tenants have not an absolute right of purchasing their holdings under section 46 of the Land Act; and the Landed Estates Court, notwithstanding it has sub-divided the estate into lots, may sell the estate in one lot, by private offer or public auction, if such a course appears most advantageous to the owners or incumbancers.*

FLANAGAN, J., said :—In this case the facts, as I understand them, are as follows :—The estate which was brought for sale here is only a small portion of a very extensive estate, and the property is perfectly solvent, and subject only to one family charge; particularly, it is an unincumbered estate. The rental was settled in July last by the Examiner in conformity with the 46th section of the Land Act, so as, by the arrangement of the lands for sale, to afford to such of the tenants as were desirous of purchasing their holdings, facilities for doing so; and the estate was sub-divided into numerous lots, each lot corresponding as far as possible, I presume, with the holdings of each of the tenants. In doing so, it is the usual practice of the Examiner, in order to test the *bona fides* of the application on behalf of the tenant, to impose on him a condition to bid a certain sum of money for his lot, and accordingly the rental was so settled. After the rental had been settled and printed, proposals were sent in to the solicitor having carriage of the proceedings by most of the tenants—in point of fact by all except four, the tenants interested being twenty in number. Those proposals were submitted to me on the 8th of June, and at the same time another proposal was also submitted to me, on behalf of Mr. Dunville, for the purchase of the entire estate for the sum of £54,000. On that occasion I stated that, the estate being a solvent one, and the owners representing to me that the offers which had been made were insufficient, I would not then accept those offers, but that I would put up the estate for public sale, and that if, on the sale, what I should consider reasonable sums were bid for the property, and not accepted by the owners, I would dismiss the petition. One tenant made an increased offer. Mr. Dunville also made an increased offer. An offer was then made by the solicitor for the owners to the tenants to purchase the entire estate. Of the twenty tenants, there were four who never had made, and never did make any offer. Of the sixteen who had, two withdrew their offers, and six refused to increase their offers; so that there were only eight tenants.

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\* L. E. C.; 25th June, 1875; before Flanagan, J.; 9 I. L. T. R., 124.

remaining who offered what were, no doubt, large prices for their holdings. Mr. Dunville's increased offer was then accepted by me.

On the construction of the 46th section it has been argued before me, that, when an owner has brought an estate for sale here, and on the settlement of the rental the estate has been sub-divided into lots co-extensive with the holdings of the several tenants, each tenant has then an absolute right to become, if he desires, the purchaser of his own holding, and the Court is bound to sell to them, if they so desire, even though to sell to them might (as was said in the course of the argument) "possibly work an injury to the owner." I am satisfied it never was the intention of the Legislature that estates should not be sold in this Court on the best terms for, and in the interest of the parties interested in the proceeds of the sale; and I am clearly of opinion that the rights of owners to sell to the best advantage are totally unaffected by the Landlord and Tenant (Ireland) Act, 1870. By the 46th section of the Act, "reasonable facilities to occupying tenants desirous of purchasing their holdings" are to be afforded by this Court, only "so far as it is consistent with the interests of the persons interested in the estates, or the purchase-money thereof." Did the tenants in this case get "reasonable facilities for purchasing their holdings," or did they not? In my opinion, they did get "reasonable facilities." In my opinion, I was bound to accept that private offer.

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### CHURCH v. CHURCH.\*

*A second claim barred by previous adjudications on a prior claim arising on the same act of disturbance.*

The claim, which was for tenant-right, arose on ejectment by the landlord, consequent upon notice to quit. In April, 1873, the decree for possession was made, with stay of execution until the further order of the Court; and at the same sessions the following order was made on the land claim:—"The respondent not contesting the right of the claimant to sell the lands mentioned in the ejectment by public auction; and, having regard to the second paragraph in the notice of dispute filed, let the claim be dismissed with costs." The paragraph referred to was to the effect

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\* Derry Spring Assizes, 1875; before Deasy, B.

that though the tenant, by his improper conduct, had forfeited his right to compensation, yet that the respondent was still willing to allow him to sell his interest, according to the rules of the estate, at his present rent, or such increased rent as might be fixed by an impartial and competent valuator, to any respectable tenant to whom the landlord could offer no reasonable objection. From the decree the tenant appealed. The appeal was heard by Mr. Justice Barry, at the next Summer Assizes, when he made the following order :—"As it appeared to the Court that the respondent was willing, and the respondent undertaking, to allow the appellant to exercise tenant-right on said lands by sale thereof, let the said dismiss be affirmed." In Sept., 1873, the tenant put up the lands for sale by public auction, but no one having bid what he considered sufficient, he bought it in for £300. At the Sessions of October, 1873, the landlord applied to the Chairman to have the ejectment decree issued. The tenant made a cross-motion to have the time for selling extended. The Chairman refused the application to issue the decree, and extended the tenant's time to sell until 1st January following; and if no sale were made, his claim for compensation was ordered to be barred and forfeited. No sale took place; and at the April Sessions of 1874 the landlord obtained liberty from the Chairman to issue the decree, and the tenant was afterwards dispossessed. A new claim under the custom was filed; the landlord pleaded the former adjudications as barring the claim, and the Chairman awarded compensation. It was on this decree the present appeal arose.

DEASY, B., having reserved judgment, said :—I have come to the conclusion that the tenant is barred by the previous adjudication of the Chairman, affirmed by the Judge on appeal. The tenant was disturbed in his tenancy by the notice to quit, and thereupon arose an occasion to make a claim for compensation. He made such claim, and that was disposed of in the manner I have stated. He got, in the opinion of the Chairman and the Judge of Assize, the full benefit of the Ulster custom which he claimed, and was entitled to nothing. He tried to avail himself of that custom by putting up the lands for auction, with the assent of the landlord. Further opportunity was allowed him to sell his interest in the land, but he did not do so, and then the ejectment decree was executed. I am unable to see how a fresh claim for disturbance arose from the execution of the ejectment decree. The only

tenancy which the tenant had was terminated by the notice to quit. He was thenceforward a trespasser. Unless a new tenancy was created, I do not see how a new claim for compensation can be sustained. The decree must, therefore, be reversed, and the claim dismissed, with costs.

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GOUGH v. WILLIAMSON.\*

*A lessee, who has sub-let, is entitled to claim compensation for improvements made by him on the portion of the lands sub-let.*

This was a claim for compensation for improvements. The head lease, on the expiration of which this claim arose, was made in 1834 by Lord Mountmorris to John Gough for three lives. The respondent was assignee of Lord Mountmorris's estate; and the claimants were the successors of the lessee. They sub-let portions of the lands to two sub-tenants, Welsh and Doran, retaining in their own occupation another portion of the lands. Neither Walsh nor Doran, made any claim, as under-tenants, for improvements, but accepted new tenancies from the respondent. Neither Walsh nor Doran made the improvements claimed for, which were on the lands included in the sub-leases.

DR. BATTERSBY, Q.C.—I am of opinion that the claimants were continuing tenants, under the lease of 1804, down to its expiration, and subject to the under-tenancies of Walsh and Doran. The claimants have made the improvements claimed for and not the under-tenants—who have made no claim. If they had, they would not be entitled, not having made the improvements, nor having the holdings of the persons who did, under section 11 of the Act, but being new tenants under distinct contracts. I consider that the claimants, before the making of the under-leases, were clearly tenants within the definition of section 70, and entitled to compensation under section 4, of which there is nothing in the Act to deprive them. Whether the provision in the lease of 1869 operated as an exception or a re-grant, in my opinion, the claimants were lessees of the lease of 1804. They made the improvements, and never parted with their right to compensation. If they are not entitled to compensation, nobody is. I have been referred to section 20, regulating the rights of tenants under derivative estates, but it does not apply. I reverse the Chairman's dismissal.

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\* Wexford Summer Assizes, 1875; before Dr. Battersby, Q.C., one of the going Justices of Assize; 9 I. L. T. R., 159.

## HOLDEN v. DOBBS.\*

*Devisee of the interest of a deceased tenant in a holding subject to the Ulster tenant-right custom, to whom no reasonable objection is made:—*

*Held, entitled to the benefit of the custom.*

This was an appeal by the claimant from an order of the Chairman dismissing a claim under the Ulster tenant-right custom, made by a devisee and executor of a deceased tenant, who, it was admitted, if living, would have been entitled to the benefit of the custom. The landlord had ejected the claimant, and put a relative of the testatrix, whom he considered more worthy than the claimant, in possession of the farm. The judgment of the Chairman is reported *post*, p. 529.

MORRIS, C.J.—This claim was dismissed by the Chairman, I presume, upon the grounds alleged in the defence put forward by Mr. Dobbs, through Mr. Stewart, who represented him, that the usage on the estate was that when a tenant desired to part with his farm, he communicated his intention to the landlord, who designated the person with whom the outgoing tenant was to deal, in an otherwise unrestricted way, and that he had the power, on the death of a tenant, of similarly designating who the new tenant should be. Accordingly, on the death of the testatrix in this case, she having willed her interest in the farm to John Holden, the landlord declined accepting Holden as tenant, and gave the farm to one James Bartley. I must treat this power of designating a successor on the death of a tenant exactly on the same principle as I would the power of selecting or designating a tenant if the testatrix were alive and wanting to sell. The ordinary tenant-right usage, under such circumstances, is that the landlord properly reserves to himself the power of objecting to a tenant; but it must be a reasonable objection—a valid objection—otherwise the right of the tenant might be absolutely destroyed by any landlord who would have it in his power to object to any and every tenant who offered. Such a custom would utterly destroy the tenant-right interest. My opinion therefore is that the objection of the landlord must be a reasonable

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\* Antrim Spring Assizes, 1876; before Morris, C.J.

objection. That appears also to be the rule to apply when a tenant dies and leaves the property to any person, otherwise the same anomaly would arise. The tenant's interest might be defeated by the landlord saying, "I will allow no representative of the deceased tenant, whether widow, son, daughter, or any one else named by him, to occupy the land, but I will select some new person of my own." If he does so, he must give reasonable grounds for his proceeding. The landlord was just as much bound to show a reasonable objection to the person to whom the testatrix had willed her interest as he would be if she had nominated him when alive. There was no suggestion, of that sort made on the part of Mr. Dobbs. He relied on his right to say, "I decline Holden, and I designate Bartley." But he should have shown some reasonable objection to Holden; and not having done so, he must pay a reasonable sum under the circumstances. I shall therefore reverse the dismiss of the Chairman, and award the claimant £450 compensation and £10 costs.

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ANDERSON v. HALLIDAY.\*

*Form of tenant-right claim.*

*Effect of office rules on prevalent tenant-right usage.*

This was a claim under an Ulster tenant-right usage, whereby, it was alleged, "the tenant in occupation was entitled to sell his interest, commonly known as his tenant-right, in his holding, subject to the rent at which it was held, or such altered rent as should not encroach on the said interest or tenant-right, at the best rate, to any solvent tenant to whom the landlord should not make reasonable objection." The Chairman had dismissed the claim on the ground that the usage proved was not an Ulster tenant-right usage, but, at the best, one of compensation for improvements.

On the appeal several cases were proved of out-going tenants parting with their farms to successors approved of by the landlord, and, as alleged by the claimant's witnesses, on sale of the tenant-right. On behalf of the landlord it was alleged, and Mr. Gordon, the agent, deposed that the rule of the estate was, that

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\* Antrim Spring Assizes, 1876; before Morris, C.J.



when a tenant parted with his interest a successor was designated, and if he had made improvements he was allowed to be liberally compensated therefor by the person so designated; that on one or two occasions the landlord had himself so compensated out-going tenants; and that Mr. Gordon had frequently warned the persons so dealing that these transactions were not to be considered tenant-right sales. The estate of General Halliday, the respondent, consisted of about 3,000 acres, and was surrounded by estates on which the tenant-right custom prevailed. The claimant relied on special circumstances in his case, which, as the decision of the learned Judge did not turn upon them, it is unnecessary to detail.

MORRIS, C.J., called attention to the form of claim. No such usage had ever been proved before him. The largest usage was one to sell at the present or a fairly-valued rent—not, as alleged here, “at a rent which should not encroach upon the tenant-right.” A fairly-valued rent must necessarily encroach upon the tenant-right more or less. The usage on this estate also appeared to be one of sale, not at the best, but at a reasonable rate.

The claim was amended in accordance with his Lordship’s suggestion.

MORRIS, C.J., on a subsequent day gave judgment as follows :—It appears that this estate having been held under lease until about forty years ago, no evidence or tradition of what the management then was existed. Any usage that could be established now should be a usage that had sprung up since the expiration of the leases. Messrs. Gordon and Halliday stated that the usage was simply to allow for improvements. However, the way that was done was, to say the least of it, so vague as scarcely to be a matter that could be relied upon. If it were simply a payment for improvements, these improvements would have been looked into, and their value decided upon, but this appears never to have been done at all. When I asked Mr. Gordon what he usually did when a tenant came to ask leave to sell, he said that when a tenant told him he wanted to part with his farm to a person, he inquired into his character, and if he approved of him, he told him to settle with the out-going tenant, but he always warned him on the basis of his improvements. I cannot take that as disturbing the usage, which certainly existed for a period extending over forty years, of buying those farms. I was always under the impression that there was no

stereotyped usage to be adopted in these cases, and that I should decide fairly according to what was proved to be the usage. It is plain to me that there was a sale more or less of the tenant's good-will. That never was, I am perfectly satisfied, recognized by the landlord as being the highest rate that could be got for it. On the contrary, caution was given to the parties that they would not be admitted if they paid an extravagant price for it. Then there was the evidence that a man named Vint signed an agreement in the year 1851, showing the terms on which he was to be allowed to hold; and, in my opinion, this evidence on the part of General Halliday substantially disproves General Halliday's case—namely, that it was only improvements that were allowed to be purchased. This agreement was made in the year 1851, many years before the Land Act was passed or these matters assumed a legal position. It said “that the farm should be re-valued,” and then it went on to say “that he (the landlord) will be no party to extravagant purchases, as he wished to keep his rent low to make his tenants comfortable, and that this would be to defeat his intention. It would not be giving money for the good-will, but giving extravagant sums for possession.” I therefore take it that the rule on this estate was, that the tenant was allowed to sell, not at the best, which I understand as the highest sum that could be got, but at a reasonable sum, and accordingly this usage I now hold to be established. I shall, therefore, reverse the dismiss, and decree in favour of Robert Anderson, the claimant, on the usage to sell at a reasonable rate to a solvent tenant, according him the sum of £265, with £10 costs. The case seemed to have been fought by the tenants in a body, and I think they were quite right in doing so, because I believe the decision affects all the other cases on the estate.

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#### CHISM v. BEATTY.\*

*Definition of town-parks.*

*Meaning of “increased value as accommodation land.”*

See the report of the Chairman's decision, *post*, p. 531.

The tenant-right custom was admitted to exist on the estate. The sole question was whether the holding was town-parks within the meaning of the 15th section.

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\* Omagh Spring Assizes, 1876; before Palles, C.B.

PALLES, C.B.—To constitute a town-park under sec. 15 of the Land Act, the holding should fulfil three conditions :—First, it should adjoin, or be near to, a city or town ; secondly, it should bear an increased value as accommodation land over and above the ordinary letting value of land occupied as a farm ; and thirdly, it should be in the occupation of a person living in such city or town, or the suburbs thereof. For the purposes of my decision, I shall assume, although I do not decide, that Castlederg is a town within the meaning of the section, and that the holding in question is near to this town. It is admitted that the claimant lives in Castlederg ; therefore, I assume that the first and third conditions have been fulfilled, and thus the question in the case is reduced to the consideration of the second—Do these lands bear an increased value as accommodation land ? There appears to be no doubt that the lands are more valuable than lands of a similar quality situate at a greater distance from Castlederg ; and the conclusion that I draw from the evidence is that the lands bear this increased value as a farm, and when occupied as such. The case is an instance of that which is the experience of us all—that distance from the nearest market town is often an element in determining the value of a farm. The value of such a farm, although it may be called “increased value,” as compared with the value of a farm of similar quality in a different locality, is, in truth, no more than the normal or ordinary value of the particular land occupied as a farm. This value is not an increased value within the meaning of the Land Act. The standard prescribed by the 15th section is “the ordinary letting value of land” (*i. e.*, the particular land) “occupied as a farm.” To render its actual value an increased value within the section, it must be an increased value over and above its ordinary letting value as a farm, and the element from which the increased value must be derived is the land being “accommodation land.”

What is “accommodation land ?” I agree in the opinion expressed by Mr. Baron Fitzgerald in *Hodgins v. Dunally* [*ante*, p. 465], that it means land taken by a person residing in a city or town for the accommodation of his residence in the city or town. I am not satisfied that the farm in question was taken or used for this purpose, and I am of opinion that the value the lands bear is to be attributed not to any particular purpose for which they have been taken or used, but to the locality in which they are situate, and that such value is their ordinary value as a farm. For these reasons I am of opinion the lands are not town-parks, and I affirm the decision of the Chairman with costs.

JOHNSTON *v* BEATTY.\*

*The mere fact of a tenant entering without paying for the tenant-right—Held, to be not inconsistent with the custom, and insufficient to deprive the tenant of compensation.*

The Chairman had given a decree for tenant-right. On appeal it was argued that the fact of the tenant entering without paying for the tenant-right acted as an extinguishment of the custom.

PALLES, C.B.—The special defence in this case put forward is not that the holding was never subject to the Ulster tenant-right usage, but that, having been once subject to it, it had ceased to be so prior to the passing of the Land Act. The *onus* of establishing a state of facts effectuating this result clearly lies upon the landlord. It has been proved that the claimant did not, when entering into possession of this holding, or indeed at all, pay anything for the tenant-right. When I say that this is the only material fact proved by the respondent, I do so not as indicating that it is not a fact of great significance, but to point out that the question for my decision is not the weight and efficacy which ought to be attributed to this fact as one of several material circumstances, but whether *per se*, and deriving no assistance *aliunde*, it is adequate to extinguish or exclude the application of the usage. Now, in the first place, it is right to observe that no evidence has been given that, according to the usage itself, the right of the tenant to compensation is excluded, or does not arise, if he himself has not paid money on entering. Some evidence indeed was given to the contrary. To this, however, I do not attribute much—indeed I may say any—weight. I prefer dealing with the case as one in which there is no coercive evidence as to the exact application of the custom, to the event of the person disturbed being a tenant (or the representative of a tenant) who has not paid for the tenant-right.

The usage or custom proved being general, and the appellant's case depending upon the existence of an exception out of that general usage, I am of opinion that, unless the exceptional state of facts relied upon be inconsistent with the application of the usage to the case in hand, it lies upon the appellant to prove that the usage was subject to that exception.

This not having been done, the question is reduced to this—Is the tenant-right usage inconsistent with an in-coming tenant being accepted

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\* Omagh Spring Assizes, 1876; before Palles, C.B.

as such without paying any sum for the value of the tenant-right? In my opinion it is not. On the contrary, it is the natural result of the operation of the custom in times of such agricultural depression that the value of the farm, subject to the existing rent, would be nominal merely. This is the view taken by Mr. Justice Fitzgerald in *Magee v. Marquis of Bath* [*ante*, p. 477], and in that view I concur. I have been referred to the judgment of Mr. Baron Dowse in *Irvine v. M'Kelvey* [*ante*, p. 380]. I have carefully considered that judgment, and entirely concur in it. I agree in the principles there laid down, and in their application to that case. The facts of that case were, however, wholly different from the present. There, for instance, the last letting was not a letting from year to year, but for one year certain. Each case of this description must depend upon its own special facts. Upon the whole, I am clearly of opinion that, in the case before me, the decree below was right, and I accordingly affirm it with costs.

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MOFFATT v. KER.\*

*Purchase of the tenant-right by the landlord and letting on terms inconsistent with the custom.*

This was a claim under the Ulster custom in respect of a holding, from which the claimant had been ejected, containing 6 acres, Irish, situate a quarter of a mile from the village of Clough, valued at £11 15s., and held at a rent of £10 10s. The holding in question formed part of a farm of 37 acres, Irish, held by one Ranagan till 1852, who was then ejected for non-payment of rent, the arrears amounting to £207. The landlord held it for a few months in his own hands, finding great difficulty in getting a tenant, owing to the bad times. It was finally split up into seven portions, two of these portions being added to large farms in the neighbourhood, the tenants of which dwelt in Clough; one portion (part of the present holding) was given to David M'Mechan, who lived in the adjoining village of Seaforde; another portion (the remainder of the present holding) was given to Mrs. M'Cartan, who kept the post-office in Clough; and the other portions were

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\* Down Spring Assizes, 1876; before Fitzgerald, B.

given to inhabitants of Clough. The aggregate rent of these several sub-divisions was greater than that paid by Ranagan. On behalf of the landlord, Mr. Anketell, who was agent of the estate when this arrangement was made, gave evidence that he agreed with Ranagan for a surrender of the farm on being forgiven the arrears, and that he re-let the several portions expressly as accommodation land, for use solely as town-parks. The several tenants of the lots were to pay a year's rent in advance, so that at the termination of the tenancy there should always be one year's rent in the landlord's hands as security.

On the landlord's side it was contended, firstly, that the land was town-parks; and secondly, that even if it were not, the landlord had acquired the tenant-right.

FITZGERALD, B.—I shall not meddle in the slightest degree with the question whether or not this holding is town-parks within the meaning of the statute. I am perfectly satisfied that there was a clear purchase by the landlord in 1852, and therefore more than twenty years ago, of the tenant-right of a large farm, of which this holding was a part, and that there was on the division of that farm a letting upon terms which make it clear to me that none of the parties could possibly have understood that the land was to be subject to tenant-right. I shall therefore affirm the decision of the Chairman with costs.

## CHAIRMEN'S DECISIONS, 1873-6.

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### BROWNE v. BRUCE.\*

*Practice as to stay of execution on ejectment, where there is a concurrent land claim.*

*Effect of attempted restrictions on a previously unrestricted tenant-right custom.*

See the report of this case on appeal (*ante*, p. 488). The main facts are stated in the learned Chairman's judgment.

The CHAIRMAN.—The claimant is under ejectment at the suit of Sir Hervey Bruce. My general rule is, that when an ejectment is ripe for hearing, and a land claim for compensation, which I regard as *bona fide*, in respect to the lands is served, I direct a stay of execution on the ejectment in order to have the land claim and ejectment disposed of at the same time, because I think it right that the land should not go out of cultivation; and because, under the 21st section of the Land Act, the tenant is not to be disturbed until he is paid the compensation, if any, awarded to him. I think, that, as I find in a considerable percentage of cases, the difference between the parties merely is, what amount of rent is ultimately to be paid, I do no injustice by granting a stay of execution in order to have the lands in crop and under cultivation; but, if I am told, and believe, that it is not a question of terms of re-letting or amount as to rent, and that the landlord insists upon getting his land, and that he is, as in this case, a mark for the amount of compensation, if any, awarded, I grant, when demanded, a decree without stay of execution. In this case I was apprised that it was not a contention as to the amount of rent, but that the respondent required the land for his own purposes, and insisted upon obtaining it. I therefore gave a decree for possession without stay of execution, and in anticipation of the case made by respondent, I may as well here say that I do not yield to the argument that from the time that decree for possession was pronounced, the claimants are responsible for waste or deterioration. If the respondent failed to execute the decree, which he, as a right, insisted

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\* Magherafelt Land Sessions, April, 1874; before J. C. Coffey, Q.C.

upon obtaining, the claimants, in my judgment, are not liable for the neglected condition of the land arising therefrom.

The point insisted upon by the claimant is:—That there is a usage prevalent upon this estate, known as the Ulster custom, under which the tenant has a right of sale unlimited in amount. This custom is supported by the following evidence:—1st. With the exception of the adjoining estate of Mr. Cromie (as to which there is no precise evidence except that of Captain Stronge, who speaks only of recent occurrences), there is upon the surrounding and adjoining estates—notably the estates of the Mercers' Company, and generally throughout the County of Derry—a right of sale of the good-will or tenant-right, unrestricted as to amount. Of this I have judicial knowledge. It differs as to degree. There may be a preference given to a tenant on the estate who offers as much as any other purchaser. 2nd. By a body of evidence going to show sales upon this estate from 1815 down to 1858, without limit as to amount, in the presence of, and without objection on the part of the then agent (Mr. Knox). Latterly, however, after Captain Stronge became the agent, there was a restriction or attempted restriction to five years' purchase on the rental.

On behalf of the respondent it was contended—1st. That there is no evidence of the Ulster custom, known as tenant-right, prior to the lease of 26th January, 1770, when the Clothworkers' Company (from whom, in 1871, the present respondent purchased) demised the estate to Richard Jackson, under a lease which expired in 1840. 2nd. If such custom is, upon the evidence adduced or otherwise, to be presumed to exist, so far as the Clothworkers' Company and the respondent who derives under them is concerned, it was extinguished during the existence of the said lease. 3rd. If the alleged custom commenced after the expiration of the said lease, it was encroached upon and disturbed so as to be destroyed by the acts of Captain Stronge, the agent of the said Company, after his appointment in December, 1859, by which acts respondent alleges he restrained, or attempted to restrain, the sales made, or attempted to be made, by some of the tenants of the said estate to a maximum of five years' purchase of the rent payable by the tenants of the said estate.

Following the cases of *Austin v. Scott* (*ante*, p. 184), and *Little v. Nesbitt* (*ante*, pp. 78, 403), if upon this estate the custom of sale, lease or no lease, prevailed, I am bound to give effect to that custom. A legal custom must have been in existence for such a period of time—say over twenty years—that its existence beyond human memory may be *prima facie* presumed. There is a body of evidence before me, beginning in 1855, which, without controversy (as I judge the



facts as a juror), establishes that sales took place under the sanction, in the presence, and with the distinct approval of Mr. Knox, from about the year 1840 down to Captain Stronge's appointment in December, 1859: Captain Stronge says, that at and after his appointment he was desired by the Company to limit the sales to five years' purchase of the rental. Is, then, a modern usage (its inception being in 1859) to countervail and defeat the Ulster custom, if it prevailed during the lease of 1770, and from its expiration in 1840 down to Captain Stronge's appointment in 1859? I think not. This modern usage, not communicated to the tenants on this large estate by printed or written circular, announced in some general way only, cannot bind any one but those who choose to contract themselves out of the custom, which is law from 1st August, 1870. As regards the early existence of tenant-right in Ulster, I do not want to go back to the time of the Plantation. I do not think I have any right to consider the policy of James or of Charles, or to comment upon it; but this I do say, individually speaking, and founding my opinion upon judicial experience and knowledge, if ever anything was, humanly speaking, demonstrated, it is this—that, with rare exceptions, there does prevail, and has prevailed from time immemorial, through this county, what is called and known as the Ulster custom, a custom differing, no doubt, in degree upon particular estates, but coming down from early times, and presenting the same broad general features. My views, derived from experience and my judicial knowledge, may not be within the ken of the Judge and the Court who may determine this case on appeal; and I therefore recommend, for truth's sake, that this evidence may be forthcoming, as it has been to me again and again repeated with the same invariable result. I award, as compensation, £250, and costs.

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#### BOLAND AND RUDDOCK v. PORTER.\*

*Forfeiture of the benefit of the Ulster tenant-right custom.*

Boland, holding as tenant from year to year, advertised his farm for sale by auction. The agent objected to sale by auction, informing him that he would not allow more than £10 per Irish acre, and that he should sell to some adjoining tenant on the estate by private contract. Boland sold privately, at £17 per

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\* Armagh L. S., 9th April, 1874; before Hans H. Hamilton, Q.C.; 8 I. L. T. R., 93.

acre, to Ruddock, who lived on another estate seven miles distant. Ruddock was refused as tenant; and an offer of a purchaser, an adjoining tenant, at £10 per Irish acre, was refused by Boland, who put Ruddock into possession. Notice to quit was served, and claims made under the Ulster custom\*—one, jointly, by Boland and Ruddock, and a separate claim by Ruddock.

The CHAIRMAN.—In my opinion the conduct of the agent was fair and reasonable, and did not constitute any breach of the tenant-right custom. The conduct of the tenant constituted a breach of the custom on the estate. The custom respects the rights of all; the tenant is entitled to a fair and reasonable price for his right; the landlord has a right to a solvent tenant, a fair increase of rent, and an arrangement beneficial to his estate according to moderate and reasonable views respecting it; and the in-coming tenant has the same right as the outgoing tenant, to hold at a moderate rent, not encroaching on the custom. I do not consider that the claimant, though mistaken in his course, has been guilty of such unreasonable conduct as calls on me, or would justify me, in altogether disallowing his claim. I therefore award £8 per statute acre on the joint claim by Boland and Ruddock, and I dismiss Ruddock's separate claim, and with costs, principally on account of an improper letter sent by him to the respondent.

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#### BENNETT v. JONES.\*

*The frequent service of notices to quit is inconsistent with, and a breach of, the Ulster tenant-right custom.*

Notice to quit was served, and subsequently an offer was made to withdraw it if the tenant consented to pay an increased rent demanded. The tenant objected to the rent demanded as exorbitant. Claim was made under the Ulster custom.

The CHAIRMAN.—It is quite reasonable, according to the tenant-right custom, that a revision of the rent should take place by valuation on great occasions, or where a permanent change in values has taken place; but the tenant should not be called on to pay an increased rent in respect of improvements made by him, except in so far as they have increased the productive power of the land relatively

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\* Ballybot L. S., 31st March, 1874; before H. H. Hamilton, Q.C.; 8 I. L. T. R., 94.

to its state as originally demised. This was a general valuation by the landlord, caused solely by the change in the times, and seems to have been a fair proceeding on the landlord's part. It is not, however, desirable that those changes should be brought about by the service of notices to quit. The frequent service of notices to quit I regard as, in itself, a breach of the Ulster custom. It disturbs the confidence of the tenant in the continuance of his possession of the holding. I cannot sit as arbitrator to fix the rent. Arbitration has been refused by the respondent; and I can only measure the fair amount of compensation, which I estimate at £12 per acre.

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PARKINSON v. EARL OF LONGFORD.\*

*No claim for compensation for disturbance where eviction only nominal.*

A. M'Cawley, who held as tenant from year to year, died in 1870, and his brother Robert, who afterwards took out letters of administration, was put into possession, and recognized as tenant by the Earl of Longford. In an administration proceeding the Master of the Rolls ordered a sale of M'Cawley's interest in the farm. The landlord objected to the sale as a violation of the rules of the estate, but his agent was a bidder at the sale, and the claimant being the highest bidder (but in trust for Robert M'Cawley), was declared the purchaser, and afterwards evicted, and Robert M'Cawley reinstated in possession. Claim was brought under sec. 3.

The CHAIRMAN held that the claimant was not entitled to compensation, having purchased as trustee for the administrator, who was still in possession of the holding.

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FRAINE AND WARD v. BRYAN.†

*Loss of profit rent by a middleman is not a quitting of the holding on which a claim arises—the sub-lease having become merged in the fee.*

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\* Westmeath L. S., Oct., 1874; before M. O'Donnell, Q.C.; 8 I. L. T. R., 194.

† Wexford L. S.; before H. West, Q.C.; Oct., 1878; 7 I. L. T. R., 201.

In 1836 Hon. R. Leeson leased for 3 lives a farm to James Gethings, who erected thereon the buildings for which compensation was sought. The present claimants were his devisees, and they made a sub-lease to Vincent Bartolucci for the two surviving lives of the head-lease at an increased rent. The estate of the Hon. R. Leeson and the sub-lease had become vested in the respondent. Claimant contended that the loss of the profit rent by eviction was a quitting of the holding.

The CHAIRMAN held that the lease to Bartolucci operated as an assignment, and not as an under-lease; that the claimants were, therefore, not tenants to Bartolucci's assignee, and could not claim compensation for the buildings. There was a merger of the lease with the fee, but for which the respondent himself could establish a claim as successor in title to Gethings.

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#### COMERFORD v. SAWREY AND OTHERS.\*

*Claim by sub-tenant against superior landlord for improvements.  
Measure of compensation for improvements.*

The predecessor in title of the respondents in 1776 leased the lands, out of which the claim arose, to Henry O'Brien for 3 lives, with covenant for perpetual renewal. The claimant held as tenant from year to year under O'Brien and his successors in title. The interest of the lessee was forfeited by reason of his omitting to renew. Claimant was evicted, and claimed for improvements made by her.

The CHAIRMAN.—The word "landlord" is defined as including superior landlord. Mr. O'Brien could not have sustained a claim. His case may be a *casus omissus*, but there is nothing to prevent the sub-tenant, the present claimant, from obtaining the value of his permanent improvements from the superior landlord, who gets the benefit of them. The statute has made the tenant's improvements his own property. I determine the value of the buildings by the amount of the tenant's outlay, reduced by  $2\frac{1}{2}$  per cent., for wear and tear and the tenant's enjoyment of them for 20 years. There is another test of the value—viz., to what extent the value of the farm is increased by them as they now stand; and I assume 40 years as the fair term at which to rate such improvements.

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\* Nenagh L. S.; before C. Rolleston Spinner, Q.C.; Jan., 1874; 8 I. L. T. R., 25.

## TRYE v. DUKE OF LEINSTER.\*

*Meaning of "improvements," "tillages," and "manures."*

The CHAIRMAN held that (1) compensation for manual labour and horse labour were not allowable under a claim for "improvements," nor under a claim for "tillages," if done in the ordinary management and cultivation of the farm for the tenant's own benefit; (2) compensation was not allowable for keeping farm buildings in repair, where the lease under which the tenant held contained a covenant for keeping the demised premises and all improvements thereon in good order and repair; (3) compensation for ploughing and clearing the land was allowable where the tenant derived no benefit from them by reason of the expiration of the lease; and (4) where the lease contained no covenant preventing the tenant from selling the hay, straw, roots, produced on the farm, compensation was allowable for farm-yard as well as for artificial manures.

## TAYLOR v. DOWDEN.†

*Definition of "Town-parks."*

The CHAIRMAN.—Town-parks are generally called town-fields in Ireland. The true test by which a holding of this sort can be distinguished is, not its vicinity to a town (a farm manifestly within the Act may immediately adjoin the town), not by the residence of the owner in the town, but by its being held as an accommodation for the town house, and for that purpose only. The fields in this case were never known as town-fields or town-parks—there is, however, not much in that—the important element is wanting that they have never been allotted or used for the accommodation of a house in the town. They have been held and used for agricultural and commercial purposes, and are not, in my opinion, within the meaning of the exception in sec. 15.

## TRUSTEES OF LORD KILMOREY v. ANDERSON.‡

*Town-parks.*

This was an ejectment for over-holding. Defendant, who was a shopkeeper in Newry, held eight acres, about a mile from the

\* Kildare L. S.; before T. Lefroy, Q.C.; July, 1873; 7 I. L. T. R., 138.

† Bandon L. S., April, 1874; before R. Ferguson, Q.C.; 8 I. L. T. R., 83.

‡ Newry Q. S., Jan., 1874; before R. Johnston, Q.C.; 8 I. L. T. & S. J., 109.

town, as accommodation land, which he had always treated as an agricultural holding.

The CHAIRMAN.—This holding must be considered “town-parks.” The fact of cultivating it in any way the tenant thinks proper does not alter its character.

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### BERGIN v. CASEY.\*

*Pasture holding. Unreasonable conduct. Boundary fences.*

H. P. JELLETT, Q.C.—The provision in sec. 15, sub-sec. 1, as to “holdings let to be used for purposes of pasture,” applies to cases where, by contract, express or implied, the farm could, as between landlord and tenant, be only used as a pasture farm—not to cases in which the tenant has, for his own convenience or profit, adopted that particular mode of dealing with it. The provisions of the section would seem to have been framed in accordance with the principles upon which tenants are restricted from breaking up or tilling ancient pasture. The decisions in the Law and Equity Courts have long settled that, in the absence of contract, no continuance of land in pasture during the pendency of a lease will convert land into ancient pasture which was not such when the lease was made, and I cannot think that the rights of the tenant were intended to be more restricted by this section. “Unreasonable conduct,” within the meaning of sec. 18 of the Land Act, applies to acts of such a character as amount to a breach by the tenant of his obligations as such, or which are incompatible with the proper management of the landlord's estate. In the present case the act relied on as unreasonable conduct is the refusal to pay an increased rent of £101 17s. 6d. claimed by the landlord. The tenant offered £99 10s. Evidently each party endeavoured to create a tenancy which would be in the one case within, in the other outside the compensation clauses of the Land Act. I see nothing unreasonable in the conduct of either party. The tenant is admitted to have been a good tenant, and I must hold his eviction capricious—not using the word in any offensive sense, but merely expressing that, in my opinion, no adequate cause has

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\* Parsonstown L. S.; before H. P. Jellett, Q.C.; 28th Jan., 1873; 7 L. L. T. R., 154.

been assigned for the determination of the tenancy. I cannot allow anything for fences, as the tenant is bound to maintain, at his own expense, the boundary fences between his landlord's estate and that of the adjoining proprietor, and there is nothing to show that any extraordinary expense was incurred in that respect.

This decision was upheld on appeal by the Lord Chief Baron.

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CANNON v GRAHAM.\*

*Second notice of claim where previous claim "nilled."*

T. R. HENN, Q.C., held that a second notice of claim was not maintainable where a previous notice of claim had been "nilled," neither party having appeared at the hearing.

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BURKE v. TWINAM.†

*Effect of dismissal of claim for non-appearance.*

H. H. HAMILTON, Q.C., held that where a claim had been dismissed, on account of the non-appearance of the parties, a second claim served after the time prescribed by Rule 4 (Part I.) was an absolute nullity. He was not, however, required, in order to decide this case, to hold that in no case whatever could a new claim be sustained, or to base his decision upon *Cannon v. Graham (supra)*. No application had been made for enlarging the time, nor for further adjournment, and the time was absolutely limited by the rule.

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CONNOLLY v. LORD DIGBY.‡

*"Just and reasonable terms of occupation." Costs.*

Claimant claimed compensation under secs. 3 and 4. In 1864 he became yearly tenant, holding under the terms of the contract of tenancy prevailing on the estate of Lord Digby. No signed agreement was ever taken out. Lord Digby, in 1873, tendered to Mr. Connolly a form of lease, at the same rent, but differing from the prevalent form of letting on the estate in the following particulars:—It provided that all quarries of stone or slate, all marl,

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\* Clifden L. S.; before T. R. Henn, Q.C.; 16th April, 1873; 7 I. L. T. R., 176.

† Armagh L. S.; before H. H. Hamilton, Q.C.; 24th Oct., 1873; 7 I. L. T. R., 200.

‡ Tullamore L. S.; before H. P. Jellett, Q.C.; Jan., 1874; 8 I. L. T. R., 68.

clay, gravel, and sand, bog and bog timber, should be excepted out of the demise; that the lessee should not be entitled to any corn or other crop as a way-going crop, to be sown after the expiration of the demise; that the demise should be forfeited in the event of the tenant assigning, sub-letting, or sub-dividing the farm, becoming bankrupt or insolvent, or having his interest taken in execution, or any judgment decree or order being registered against it, or an order for the sale of it made by a competent court. The tenant refused these terms, and was evicted.

H. P. JELLETT, Q.C., held that the conduct of the tenant in so refusing was not unreasonable, so as to disentitle him to compensation for disturbance. He should be frustrating the whole policy of the Land Act were he to hold that the refusal of the tenant to contract himself out of any of the benefits conferred by the Land Act, or to place himself in a position in which these benefits were liable to be forfeited, or asserted with less effect, could be treated as unreasonable conduct on the part of the tenant, and as absolving the landlord from the necessity of making any compensation for disturbance. He had already decided this point in *Bergin v. Casey* (*ante*, p. 518), in which the landlord evicted the tenant because the latter refused to assume a rent which would have placed him outside the limit assigned by the Land Act in case of yearly tenants claiming compensation for disturbance, and his decision was upheld on appeal by the Lord Chief Baron. He did not approve of the claimant's conduct in relation to the game, and he reduced half a year from the sum which he would otherwise have allowed him, which in this, as in the other cases in which the tenant has been evicted because he refused to deprive himself by contract of the benefits of the Land Act, he would have assessed at the maximum sum. He refused costs because of the manner in which the case had been brought into court, and the irrelevant and unfounded charges made against the respondent, with which the assertion of his claim by the claimant had been accompanied.

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### HELY v. KENNEDY.\*

#### *Liability to county cess.*

T. DE MOLEYS, Q.C., held that a reservation of rent, "over and above all taxes, charges, and impositions whatever," with a corresponding covenant to pay it, in a lease executed since 1st August, 1870,

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\* Kilkenny Q. S., Dec., 1873; before T. De Moleys, Q.C.; 8 I. L. T. R., 26.



in the claim mentioned, at the yearly rent of £15, instead of the former rent of £12 5s., the tenant continuing to pay county cess as formerly, and the claimant having accepted such offer, respondent agreeing that the claimant shall hold the said holding as of his former tenancy, the said claim is hereby dismissed by consent, without prejudice to the tenant-right attached to the holding."

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PARKER v. GRAHAM.\*

*Setting of house and garden, with con-acre privileges, at a bulk rent—held within the compensation sections.*

The claim was under secs. 3 and 4. Claimant held a house and garden, a two-acre field in grass, and got yearly in con-acre a rood of ground for flax, and as much potatoe ground as she could manure on the respondent's farm—paying for all £6 yearly. The landlord also kept the house in repair. It was argued that the holding was not agricultural, but a cottier holding (or cottage allotment), and therefore not within the scope of the Act.

The CHAIRMAN held it was a holding within the meaning of the Act, and awarded six years' rent, and a small sum for buildings.

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*In re ESTATE OF LORD R. MONTAGUE.†*

*Confirmation of lease.*

Application was made, on behalf of a tenant, for confirmation of a lease granted by Mr. Cromie, a limited owner, and who had died after its execution. Lord Robert Montague who succeeded him was served with notice of the application, but he offered no opposition.

The CHAIRMAN held that he had authority to confirm the lease already granted. At the same time he considered that a new lease should have been applied for on the succession of Lord Robert Montague to the estate.

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\* Strabane L. S., July, 1875; before Sir F. W. Brady, Q.C.

† Ballymena L. S., June, 1875; before J. H. Otway, Q.C.

## POLLOCK v. M'CONAGHY.\*

*Claimant disputing his landlord's title, refused compensation for disturbance.*

At the hearing of the ejectment process against him, the claimant disputed his landlord's title, on the ground, which wholly failed, that he had purchased the land from him.

The CHAIRMAN said he should give nothing for disturbance, for the simple reason that the claimant had set up a hostile title to his landlord. He unjustly claimed on a got-up case the absolute right to this land, for which he paid rent.

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 BONAR v. LORD LIFFORD.†

*Order for limited administration.*

The claimant having died subsequent to the filing of the claim,

The CHAIRMAN made the following order :—"On the application of Mr. O'Doherty, let administration of the assets of Bridget Bonar, deceased, limited to the purposes of this Act, be granted to Hannah Kearney, wife of James Kearney, one of the next of kin of deceased, the said James Kearney and his wife to be substituted as claimants in the case."

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\* Ballymena L. S., April, 1875; before J. H. Otway, Q.C.

† Letterkenny L. S., April 1874; before James Gibson, Q.C.

# INDEX TO REPORTS.

## ABBREVIATIONS:—

C.L.C.R.—	<i>Court for Land Cases Reserved.</i>
L.A.—	<i>Land Appeal.</i>
C.C.—	<i>Chairman's Court.</i>
Ch. A.—	<i>Chancery Appeal.</i>
Ex. Ch.—	<i>Exchequer Chamber.</i>
Q.B.—	<i>Queen's Bench.</i>
C.P.—	<i>Common Pleas.</i>
Ex.—	<i>Exchequer.</i>
C.B.A.—	<i>Civil Bill Appeal.</i>
L.E.C.—	<i>Landed Estates Court.</i>

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